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NO. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RALPH KEMP, WARDEN,

Petitioner,

v.

CURFEW DAVIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether this case presents a significant federal question with respect to establishing a standard to determine when a statistical disparity is so significant as to mandate a finding that a prima facie case of jury discrimination has been established?

2.

Whether this case presents a significant federal question with respect to the appropriate standard to be applied in determining when the State has rebutted a prima facie showing of discrimination in the composition of the grand and traverse juries?

3.

Whether the standards set forth by this Court in *Sandstrom v. Montana*, 442 U.S. 510 (1979), for determining when a charge on an essential element of an offense is burdenshifting, has been intolerably broadened by the United States Court of Appeals for the Eleventh Circuit to a standard which requires that a charge must not contain any conflicting language as to the permissive nature of any applicable presumption concerning an essential element of the offense in order to pass constitutional muster?

4.

Whether the pendency of *Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983), *cert. granted*, ____ U.S. ____, 104 S.Ct. 2677 (1984), in this Court, involving one of the same issues, i.e. an allegedly unconstitutionally burdenshifting charge under *Sandstrom v. Montana*, 442 U.S. 510 (1979), requires the granting of this petition for a writ of certiorari?

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NO. _____

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RALPH KEMP, WARDEN,

Petitioner,

v.

CURFEW DAVIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Ralph Kemp, respectfully prays that the writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals entered in this action on December 27, 1983 (panel decision) and on January 24, 1985 (*en banc*).

OPINIONS BELOW

The decision of the panel of the United States Court of Appeals for the Eleventh Circuit, the validity of certain portions of which was affirmed, in part, by the *en banc* decision of the Court, is reported in *Davis v. Zant*, 721 F.2d 1478 (11th Cir. 1983). (Appendix B). The *en*

banc decision of the United States Court of Appeals for the Eleventh Circuit is reported in *Davis v. Kemp*, 752 F.2d 1515 (11th Cir. 1985). (Appendix C). The opinion of the district court denying Respondent's application for federal habeas corpus relief is unreported. (Appendix A).

JURISDICTIONAL STATEMENT

The opinion of the panel of the United States Court of Appeals for the Eleventh Circuit was entered on December 27, 1983. *See Davis v. Zant*, 721 F.2d 1478 (11th Cir. 1983). (Appendix B). Petitions for rehearing *en banc* were granted on March 6, 1984. The *en banc* decision of the United States Court of Appeals for the Eleventh Circuit, reinstating portions of the panel opinion and reversing and remanding for appropriate relief was entered on January 24, 1985. *Davis v. Kemp*, 752 F.2d 1515 (11th Cir. 1985). (Appendix C).

This petition for a writ of certiorari has been timely filed within the allowable ninety days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Section I, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION

O.C.G.A. § 16-5-1:

> A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killings show an abandoned and malignant heart.

STATEMENT OF THE CASE

Respondent was tried and convicted of the offense of murder in the Superior Court of Troup County, Georgia, on November 12, 1974. Following his jury trial, Respondent was sentenced to death. On direct appeal to the Supreme Court of Georgia, that Court affirmed Respondent's conviction and sentence in *Davis v. State*, 236 Ga. 804, 225 S.E.2d 241 (1976). A petition for a writ of certiorari was filed in this Court and Respondent's conviction was affirmed, but his sentence was vacated by this Court in *Davis v. State*, 429 U.S. 122 (1976). On remand from this Court, the Supreme Court of Georgia vacated Respondent's death sentence and remanded the case to the trial court for a new trial as to sentence in *Davis v. State*, 238 Ga. 295, 232 S.E.2d 565 (1977).

On retrial of the sentencing phase, Respondent was again sentenced to death on June 18, 1977. On direct appeal to the Supreme Court of Georgia, Respondent's sentence was affirmed in *Davis v. State*, 241 Ga. 376, 247 S.E.2d 45 (1978). A petition for a writ of certiorari was denied by this Court in *Davis v. Georgia*, 439 U.S. 947 (1978).

After Respondent's conviction and sentence were affirmed on direct appeal, Respondent filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia in February of 1981. The petition was twice amended and on April 2, 1981, Respondent received an evidentiary hearing. On July 16, 1981, the state habeas corpus court entered an order denying Respondent state habeas corpus relief. On September 8, 1981, the Supreme Court of Georgia denied Respondent's application for a certificate of probable cause to appeal from the decision of the state habeas corpus court. A petition for a writ of certiorari was denied by this Court on February 22, 1982.

Next, Respondent filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, on July 26, 1982. This petition was accompanied by an application for a stay of execution. (R. 32). The application for a stay of execution was granted on July 27, 1982. (R. 34). A show cause order was issued on April 9, 1982 (R. 444). Petitioner filed an answer and response to the allegations of the petition and a brief in support thereof on September 1, 1982 (R. 45-117). Respondent requested an evidentiary hearing as to certain issues by means of a brief filed on September 17, 1982. (R. 119-131). Petitioner opposed Respondent's motion for an evidentiary hearing in a brief filed on September 29, 1982. (R. 197-203).

On November 19, 1982, the United States District Court entered an order finding that an additional evidentiary hearing was not mandated under the principles of *Townsend v. Sain*, 372 U.S. 293 (1973). (R. 206). The district court reviewed each of the allegations raised by the Respondent, found them to be without merit and denied the petition for a writ of habeas corpus. (R. 204-215). (Appendix A).

Respondent filed an application for a certificate of probable cause to appeal on December 14, 1982 (R. 222-223) and a notice of appeal was filed on that same date. (R. 224-225). The district court granted Respondent's application for probable cause to appeal, *in forma pauperis*, on January 5, 1983. (R. 226-227).

Following oral argument in the United States Court o Appeals for the Eleventh Circuit, a panel of that Court entered an order dated December 27, 1983 granting habeas corpus relief based on the finding that Respondent had been sentenced in 1977 before an unconstitutionally composed jury and remanded the case for another sentencing trial. (Appendix B). On March 6, 1984, the Eleventh Circuit ordered that the case be heard *en banc*, with oral argument. On January 24, 1985, the Eleventh Circuit, sitting *en banc*, entered an order affirming the panel's decision as to the 1977 sentencing jury, but also finding that the trial court's instructions concerning intent and malice were burdenshifting (during the 1974 guilt-innocence phase of Respondent's trial) so as to be unconstitutional under the decision of this Court contained in *Sandstrom v. Montana*, 442 U.S. 510 (1979), but held that these instructions constituted harmless error under the particular circumstances of this case. *Davis v. Kemp*, 752 F.2d 1515 (11th Cir. 1985). (Appendix C).

Petitioner seeks review of a portion of the holding of the United States Court of Appeals, both the panel opinion and the *en banc* decision of the United States Court of Appeals for the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

I. IN THE ABSENCE OF SPECIFIC GUIDELINES BEING PROMULGATED BY THIS COURT, THE ELEVENTH CIRCUIT IS UTILIZING A "SLIDING SCALE," ALLOWING MINIMAL STATISTICAL DISPARITIES TO SUFFICIENTLY ESTABLISH A PRIMA FACIE CASE OF JURY DISCRIMINATION.

The United States Court of Appeals for the Eleventh Circuit, sitting *en banc*, reinstated Section I of the panel opinion rendered in *Davis v. Zant*, 721 F.2d 1478 (11th Cir. 1983) (Appendix C), in which a panel of the United States Court of Appeals for the Eleventh Circuit found that Respondent Davis had established a prima facie case of jury discrimination with respect to the resentencing jury composed in 1977. (Appendix B). In Section I of the panel opinion, reinstated by the *en banc* court, the panel also found that the testimony of the jury commissioners did not successfully rebut the prima facie case of jury discrimination allegedly established by Respondent. Petitioner seeks a petition for a writ of certiorari on both of these findings of the panel opinion in *Davis v. Zant, supra*. Petitioner contends that, in the first instance, statistical disparities are being misused by the United States Court of Appeals for the Eleventh Circuit in order to determine whether, as an initial matter, a prima facie case of jury discrimination has been established. Second, as will be discussed in the next section of this petition for a writ of certiorari, Petitioner submits that absent guidance from this Court, the United States Court of Appeals for the Eleventh Circuit has rendered it impossible for the State to ever rebut a prima facie showing of jury discrimination in the composition of the grand or traverse juries.

Respondent contended in his application for federal habeas corpus relief that the traverse jury which resentenced him to death in 1977 was unconstitutionally composed in violation of his Sixth and Fourteenth Amendment rights, as he contended that there was a substantial underrepresentation of blacks and women, so as to establish a prima facie case of jury discrimination which was unrebutted by the State. The issue was raised on direct appeal to the Supreme Court of Georgia and decided adversely to the Respondent. *See Davis v. State*, 241 Ga. 376, 247 S.E.2d 45 (1978), *cert. denied, Davis v. Georgia*, 439 U.S. 947 (1978). The district court, assumed without deciding, that a prima facie case had been demonstrated, but concluded that any such prima facie case had been adequately rebutted by the State.

In *Davis v. Zant*, 721 F.2d 1478 (11th Cir. 1983), a panel of the United States Court of Appeals for the Eleventh Circuit found that under the standards set forth by this Court in *Castenada v. Partida*, 430 U.S. 482 (1977), and *Duren v. Missouri*, 439 U.S. 357 (1979), Respondent had established a prima facie case of jury discrimination which was unrebutted. Petitioner does not contest Respondent's contention that black persons and women are recognizable and distinct classes under the standards as set forth in *Castenada v. Partida, supra*. *See also Taylor v. Louisiana*, 419 U.S. 522 (1975). However, Petitioner contends that the statistical disparity presented to the Eleventh Circuit Court of Appeals by the Respondent did not establish unfair representation of blacks or women in the composition of the traverse jury which resentenced Respondent, when the composition of the jury as to these two distinct groups is compared to these groups in the population as a whole.

This Court has never articulated precise mathematical standards for gauging systematic exclusion in jury selection procedures. *See Alexander v. Louisiana*, 405 U.S. 625, 630 (1972). The panel of the Eleventh Circuit also took note of this fact in determining that a prima facie case had been established, but looked at precedent in this Court, the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Eleventh Circuit, in determining whether or not the disparities established by Respondent were significant so as to establish an equal protection or fair-cross-section claim. *Davis v. Zant, supra*, at 1482. Petitioner submits, as illustrated by the holding of the Eleventh Circuit in this case, that without specific guidelines being set forth by this Court, the United States Court of Appeals for the Eleventh Circuit is utilizing a "sliding scale" as to when there is a statistical disparity which is so significant as to establish a prima facie case of jury discrimination.

Prior to the decision of the Eleventh Circuit in *Davis v. Zant, supra*, the United States Court of Appeals for the Eleventh Circuit in *Gibson v. Zant*, 705 F.2d 1543 (11th Cir. 1983), noted this Court's decision in *Alexander v. Louisiana, supra*. The Court found that the statistical disparities present in *Gibson*, ranging from 20 percent to 38 percent, were within the range of disparities found to be significant in other cases. *Id.* at 1547. Similarly, in *Davis v. Zant, supra*, the panel found that the disparities present, ranging from 18.1 percent to 18.4 percent, were "extremely close" to the disparities found significant in other cases. *Davis v. Zant, supra*, at 1482-1483. The disparities cited by the panel that had been found to be significant in other cases were 23 percent; 14 percent; 36 percent; 42 percent; 20.4 percent. Petitioner respectfully submits that the extremely wide range of disparities

found to be sufficiently significant to establish a prima facie case of jury discrimination illustrates the need for guidelines from this Court by which the Circuit Courts of Appeals may gauge systematic exclusion. Under the decision of the United States Court of Appeals for the Eleventh Circuit in *Davis v. Zant, supra,* it appears that disparities ranging from a mere 14 percent all the way to 42 percent have been found to be significant, in and of themselves. This illustrates the need for more guidance, especially when there is minimum disparity, such as Petitioner submits is present here, coupled with other facts which Petitioner asserts are equally significant in determining whether or not a prima facie case of systematic exclusion has been established.

In *Gibson v. Zant, supra,* the United States Court of Appeals for the Eleventh Circuit drew the line at 20 percent as being a recognizably significant disparity, but in Respondent's case, the court found that an 18.1 to 18.4 percent disparity was significant, without any discussion of why a lower statistical disparity was sufficient to establish a prima facie case for Respondent. Petitioner submits that the fact that under the circumstances of other particular cases, a lesser statistical disparity might be found to be significant, should not, in and of itself, justify the lowering of the range of statistically significant disparities to the 18 percent found to exist in this case, especially if a review based on the totality of the circumstances is utilized.

For example, in this Court's decision in *Hernandez v. Texas,* 347 U.S. 475 (1954), which was cited by the panel decision in *Davis v. Zant, supra,* a 14 percent disparity was found to be significant. However, in addition to showing a 14 percent disparity, the Petitioner in *Hernan-*

dez v. Texas, supra, also established that 14 percent of the population of Jackson County, the community in question in that case, was composed of persons with Mexican or Latin American surnames and that 11 percent of the males over 21 bore such names. It was also established in *Hernandez v. Texas, supra,* that for the last 25 years prior to the time in question, there was no record of any person in the State of Texas with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County, although such persons were eligible for service.

By contrast, at the time of Respondent's retrial as to sentence, the jury commission of Troup County, Georgia, was made up of three men and three women and two of the jury commissioners were black. As noted by the district court below, only two commissioners testified that they used non-random selection methods and although this method might have had a "potential for abuse," the district court properly noted that no actual bias had been established by the use by two of the commissioners of a non-random selection method. One of the commissioners utilized a random selection method for some of the names, but went back and checked more names, utilizing "no particular pattern," but also testified that she purposefully checked names that she recognized as being the name of a black person.

Because of the "sliding scale" approach taken by the Eleventh Circuit and other circuit courts, Petitioner respectfully submits that this Court should review this case in order to establish specific guidelines for what is a significant statistical disparity. Further, guidance from this Court is needed as to how a statistical disparity should be utilized in relationship to the totality of the

circumstances presented concerning jury selection procedures. In this specific case, Petitioner submits that the percentage of disparity alone, 18.1 percent to 18.4 percent, is insufficient to establish that the representation of the group in the venires from which the juries were selected was not fair and reasonable in relation to the number of such persons in the community. Thus, Petitioner submits that the United States Court of Appeals for the Eleventh Circuit improperly granted Respondent a new sentencing hearing on this basis. Other factors which Petitioner submits should have been given more consideration by the United States Court of Appeals for the Eleventh Circuit are the minimal nature of the statistical disparity, the makeup of the jury commission itself and the fact that a predominately random selection method was utilized by the commissioners.

For all of these reasons, Petitioner submits that this Court should grant a writ of certiorari to review the question of under what circumstances and to what extent, statistical disparities are sufficient to establish a prima facie case of systematic exclusion in jury selection procedures.

II. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI IN THIS CASE, AS THE PRINCIPLES ESTABLISHED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IN THIS CASE EFFECTIVELY ELIMINATE THE ABILITY OF A STATE TO REBUT A PRIMA FACIE SHOWING OF SYSTEMATIC EXCLUSION IN JURY SELECTION PROCEDURES, UNDER ANY CIRCUMSTANCES.

As has already been noted, when the district court considered Respondent's application for federal habeas

corpus relief, the Court determined that even if a prima facie case of jury discrimination had been established, it had been effectively rebutted by the State. However, the United States Court of Appeals for the Eleventh Circuit found that the alleged prima facie case of jury discrimination had not been rebutted because, ". . . the State offered only the testimony of the jury commissioners that they had not discriminated on the basis of race or sex." *Davis v. Zant, supra* at 1485. Petitioner submits that this Court should issue a writ of certiorari because the manner in which the Eleventh Circuit reviewed the question of whether or not a prima facie case of jury discrimination had been rebutted reveals that there exists no effective way in which a rebuttal case may be established.

The testimony of the jury commissioners established that at the time of Respondent's new trial as to sentence, the jury commission was made up of three men and three women and two of the jury commissioners were black persons. One of the black jury commissioners testified that he had no knowledge of black persons being prohibited from voting in Troup County, Georgia and that black persons had no trouble in registering to vote in Troup County.

Eight persons who were former or present jury commissioners testified during the hearing on the pretrial motion challenging the jury's composition. The majority of the testimony established that a random selection method was utilized by all but two of the commissioners, with one of these commissioners, Commissioner Jones, picking people that he thought would "make good jurors" and with the other commissioner, Commissioner Morgan, picking people by no particular pattern, but purposefully checking the names of black people.

Petitioner respectfully submits that the fact that no

jury commissioner could "definitively describe" the selection procedure employed in obtaining the final list of names, does not render the jury commissioners' testimony insufficient to rebut the alleged prima facie case made out by the Respondent.

In fact, it is the Petitioner's position that unless the circumstances of this case, in which there exists a minimal disparity, an excellent composition of the jury commission itself and a random selection method being utilized for the majority of the names which compose the list constitutes a rebuttal case, it is not possible to establish a rebuttal case and there are no facts which could meet the standard set by this Court in *Alexander v. Louisiana*, 405 U.S. at 632, which provides that a State must show that "racial neutral selection procedures have produced the monochromatic result." Thus, if the standard of this Court in *Alexander v. Louisiana, supra*, is interpreted by other Circuit Courts as it was in this case, the State will face an insurmountable task in attempting to rebut a prima facie case of jury discrimination shown by a criminal defendant or habeas corpus petitioner. It is for these reasons, that Petitioner requests that a writ of certiorari issue to review this question.

III. THE "REASONABLE JUROR" TEST SET FORTH BY THIS COURT IN *SANDSTROM V. MONTANA*, 442 U.S. 510 (1979), HAS BEEN INTOLERABLY BROADENED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, SO AS TO INVALIDATE INSTRUCTIONS REPLETE WITH PERMISSIVE LANGUAGE AND WITH CORRECT CHARGES INFORMING THE STATE AND THE LACK OF A BURDEN ON THE DEFENDANT WITH RESPECT TO ESSENTIAL ELEMENTS OF THE OFFENSE CHARGED.

The *en banc* decision in *Davis v. Kemp* entered on January 24, 1985, purported to apply the decision of this Court in *Sandstrom v. Montana*, 442 U.S. 510 (1979), in light of the prior decision of the United States Court of Appeals for the Eleventh Circuit in *Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983), *modified*, 723 F.2d 770, *rehng. en banc denied*, ____ F.2d ____ (Jan. 30, 1983), *cert. granted*, 104 U.S. 2677 (1984). The Court held that:

> The instruction in *Franklin*, which contained arguably stronger curative language than that included in the instant instruction, was struck down because it failed to specify the quantum of evidence by which the defendant was required to refute the presumption against him. 720 F.2d at 1211. The instruction in the instant case, which is possessed of the same defect, requires a similar fate.

As this Court is aware, oral argument in *Franklin v. Francis*, was held in November of 1984 and the case is pending decision by this Court. Petitioner argues here, as was argued on behalf of the State in *Franklin v. Francis* that, the United States Court of Appeals for the Eleventh Circuit did not review the challenged instruction in light of the trial court's charge as a whole and did not apply the "reasonable juror" test of *Sandstrom v. Montana*, *supra*. Instead, the Court isolated a portion of the charge, out of context, and determined that if particular language was found in the charge, an impermissible presumption was created, without reference to the charge as a whole or other portions of the charge which clearly informed the jury of their fact-finding function. This was, of course, the same result reached by the Eleventh Circuit in *Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983), which was the subject of the petition for a writ of certiorari presently pending before this Court. Due to the explicit reliance of the United States

Court of Appeals for the Eleventh Circuit on the decision in *Franklin v. Francis, supra*, and the pendency of the decision in that case by this Court, Petitioner submits that this petition for a writ of certiorari should be granted, so as to provide a uniform review of the same issues.

CONCLUSION

For all of the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari in order to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit in *Davis v. Kemp, supra*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing brief, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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This 20th day of March, 1985.

SUSAN V. BOLEYN
Assistant Attorney General

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

CURFEW DAVIS
Petitioner

V.

WALTER D. ZANT, Warden
Georgia Diagnostic and
Classification Center
Respondent

CIVIL ACTION NO. C82-100N

ORDER

The above-styled habeas corpus petition is brought pursuant to the provisions of 28 U.S.C. § 2254. Petitioner was convicted of murder and sentenced to death in the Superior Court of Troup County, Georgia, in November, 1974. Although the Supreme Court of Georgia affirmed his conviction and sentence, *Davis v. State*, 236 Ga. 804 (1976), the United States Supreme Court subsequently vacated the sentence only on the basis of a violation of the standards enunciated in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Davis v. Georgia*, 439 U.S. 122 (1976). After a new trial limited to the issue of sentence in June of 1977, petitioner was again sentenced to death. This sentence was affirmed by the Georgia Supreme Court, *Davis v. State*, 241 Ga. 376 (1978), and certiorari was denied by the United States Supreme Court, *Davis v. Georgia*, 439 U.S. 947 (1978). Petitioner then filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia, which was denied in April, 1981.

The Georgia Supreme Court denied an application for certificate of probable cause to appeal the judgment of the Superior Court of Butts County, and certiorari was denied by the United States Supreme Court, *Davis v. Zant*, ____ U.S. ____, 102 S. Ct. 1491 (1982).

The instant habeas corpus petition raises numerous issues with respect to both the guilt/innocence phase of petitioner's 1974 trial and the resentencing trial held in 1977. Petitioner claims that his 1974 conviction should be set aside for the following reasons:

(a) unconstitutionally composed grand and traverse jury pools;

(b) ineffective assistance of counsel;

(c) the court's instructions to the jury contained a charge that was burden-shifting as to the elements of malice and intent;

(d) the introduction into evidence of unconstitutionally obtained statements made by the petitioner;

(e) the prosecutor's use of peremptory strikes to exclude all black persons from the traverse jury; and

(f) the use of unconstitutionally seized evidence.

Petitioner also claims that the sentence of death imposed in 1977 should be set aside for the following reasons:

(a) unconstitutionally composed traverse jury pool;

(b) improper exclusion of jurors with scruples against capital punishment in violation of *Witherspoon, supra;*

(c) failure to exclude jurors expressing fixed opinions on punishment;

(d) improper proceeding and erroneous judgment on a motion to disqualify the trial judge;

(e) introduction of unconstitutionally obtained statements made by the petitioner;

(f) denial of petitioner's motion for funds for expert witnesses and investigators;

(g) the death sentence was based on aggravating circumstances applied in an unconstitutionally vague and overbroad manner;

(h) erroneous jury instruction on impeachment of witnesses;

(i) use of unconstitutionally obtained convictions as aggravating circumstances, as well as the introduction of noncapital convictions and the length of time petitioner served on previous sentences;

(j) denial of a motion for change of venue;

(k) inadequate jury charge on mitigating and aggravating circumstances;

(l) use of peremptory strikes to exclude all black persons from the jury;

(m) improper closing argument by the prosecuting attorney;

(n) refusal to excuse a juror who would give a presumption of truth to police testimony;

(o) improper restriction on petitioner's counsel's voir dire of jurors; and

(p) that the death penalty is unconstitutional in general and in this specific case.

Petitioner has requested a hearing in order to develop additional evidence regarding his jury composition challenge and his allegation that the prosecutor systematically utilized his peremptory challenges to exclude all black persons from the jury. Petitioner also seeks to present

additional evidence regarding the proceeding on his motion to disqualify the judge at the sentencing trial, as well as the issue of the use of allegedly unconstitutionally obtained convictions as aggravating circumstances at that trial. This court has before it the record of the state proceedings in petitioner's case, including the original trial in 1974, the resentencing trial in 1977, and the state habeas corpus hearing in 1981, and concludes that petitioner has previously been afforded a full and fair evidentiary hearing on all of the issues raised in the instant § 2254 petition. Therefore, an additional hearing is not mandated by *Townsend v. Sain*, 372 U.S. 293 (1963). Accordingly, petitioner's request for a hearing in this court is hereby denied.

THE 1974 TRIAL

Jury Composition Challenge

Although petitioner claims that he was indicted by an unconstitutionally composed grand jury and convicted by an unconstitutionally composed traverse jury, he failed to raise these objections at the time of his trial in 1974. Subsequently, the state habeas court refused to consider these claims on the merits. Therefore, they are deemed to be waived unless petitioner can demonstrate the cause and prejudice requirements of *Francis v. Henderson*, 425 U.S. 536 (1976). *See Stewart v. Ricketts*, 451 F. Supp. 911 (M.D. Ga. 1978). The testimony of petitioner's 1974 trial counsel at the state habeas corpus hearing indicates that he had never filed a jury composition challenge and never thought to file one in petitioner's trial. Lack of knowledge on the part of counsel as to the possibility of asserting such a constitutional challenge is not sufficient to show "cause" for the failure to object. *Engle v. Isaac*, ____ U.S. ____, 50 U.S.L.W. 4376, 4383 (1982); *Arnold v. Wainwright*, 516

F.2d 964, 972 (5th Cir. 1975), *cert. denied*, 426 U.S. 908 (1976); *Stewart v. Ricketts*, *supra*, 451 F. Supp. at 917. The court therefore concludes that petitioner waived his right to assert jury composition challenges regarding his 1974 trial and this issue may not now be raised collaterally.

Alleged Ineffective Assistance of Counsel

Petitioner alleges that counsel representing him at his 1974 trial rendered ineffective assistance for the following reasons:

(a) permitting the police to interrogate petitioner outside the presence of counsel;

(b) failure to conduct an independent investigation, interview witnesses, or to present evidence in petitioner's behalf;

(c) failure to adequately consult with petitioner;

(d) failure to file pretrial motions;

(e) failure to conduct an adequate voir dire of jurors;

(f) failure to file a motion for change of venue despite adverse pretrial publicity;

(g) failure to file a motion for funds for expert witnesses;

(h) failure to file a motion to suppress a .22 caliber pistol;

(i) failure to move to suppress statements made by petitioner to the police, although such statements were the result of an illegal arrest and interrogation without counsel's presence; and

(j) failure to challenge the grand and traverse jury pools in Troup County.

The majority of these issues were raised in petitioner's state habeas corpus proceeding. This court having found that none of the exceptions enumerated in 28 U.S.C. § 2254(d) are applicable, the state habeas judge's factual determinations are presumed to be correct. *Id.* This court has also independently reviewed the grounds raised by the petitioner. Based on its review of the record before it, the court makes the following findings:

(1) counsel conducted his own investigation;

(2) he also interviewed some witnesses, and attempted to interview others;

(3) petitioner has not suggested nor is it apparent to the court what evidence in his behalf should have been presented but was not;

(4) counsel consulted with petitioner on a significant number of occasions;

(5) counsel conducted an adequate voir dire examination of jurors;

(6) counsel's decision not to file a motion for change of venue was at the behest of petitioner;

(7) the evidence showed that the search and seizure of the pistol was consented to, justifying counsel's determination that a motion to suppress would have been fruitless;

(8) counsel made a reasonable decision that expert witnesses were not called for;

(9) inasmuch as it is permissible for a defendant to make in-custody statements to the authorities outside the presence of counsel where there is a voluntary relinquishment by the defendant of the right to have counsel present, *see Government of Canal Zone v.*

Sierra, 594 F.2d 60 (5th Cir. 1979), the court concludes that petitioner's allegation that his attorney was ineffective for allowing questioning in his absence is without merit, since the record shows the existence of a voluntary waiver by petitioner on each of the occasions that a statement was made;

(10) there is also no basis in the record for petitioner's assertion that the statements resulted from an illegal arrest, and therefore, counsel was not ineffective for failing to move to suppress such statements;

(11) the court finds that petitioner's claim that counsel should have filed other, unspecified pretrial motions is without merit; and

(12) assuming without deciding that a successful jury composition challenge might have been brought, the court declines to find a lack of effective assistance of counsel on this ground either alone or in conjunction with any other ground.[1]

In sum, considering the totality of circumstances in the entire record, *Washington v. Estelle*, 648 F.2d 276, 279 (5th Cir. 1981), the court concludes that petitioner's 1974 trial

[1] *Compare Arnold v. Wainwright, supra*, 516 F.2d at 971 ("it does not follow without more that an attorney who fails to exercise reasonable diligence with regard to jury challenges is *a priori* ineffective") *with Goodwin v. Balkcom*, No. 81-7132 (11th Cir. Sept. 3, 1982) (ineffective assistance found where counsel's attitude evinced a fear of negative public reaction to representing an unpopular defendant, indicating a "divided allegiance," counsel failed to conduct investigation and interview crucial witnesses, failed to make proper *Witherspoon* objection, failed to object to the trial court's failure to charge the jury on mitigating circumstances, failed to request a charge on defendant's diminished capacity, failed to object to improper admission of prior convictions, failed to object on more than one occasion to the prosecution's use of leading questions, and failed to make jury composition challenge as well).

counsel met the standard for constitutionally effective assistance of counsel, that is, "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance," *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960) (emphasis in original), *adhered to in pertinent part on rehearing en banc*, 289 F.2d 928, *cert. denied*, 368 U.S. 877 (1961), and petitioner's counsel did in fact render effective assistance.

Instructions to the Jury

Petitioner also claims that the 1974 trial court's instructions to the jury improperly shifted the burden of proof on the essential elements of malice and intent in contravention of the United States Supreme Court's decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979). While the state does not contest the fact that malice and intent to kill are elements of the crime of murder in Georgia which the state is required to prove beyond a reasonable doubt, *see Mason v. Balkcom*, 669 F.2d 222, 224-225 (5th Cir. 1982), it does contend that the judge's charge, when considered as a whole, was not impermissibly burden-shifting. The court has reviewed the complete charge and finds it noteworthy that in each instance that the trial judge enunciated a presumption, he also stated that such presumption was rebuttable. In addition, the jury was never instructed that the defendant was required to supply the evidence in rebuttal. The instructions emphasized that the presumption regarding malice could be rebutted by evidence that the state had offered. Moreover, the court's instructions clearly indicated that "[a] person is *not* presumed to act with criminal intention. . . ." (emphasis added) Therefore, this court concludes that when considered in the context of the overall charge, *Cupp v.*

Naughten, 414 U.S. 141 (1973), the state court's instructions on malice and intent were not burden-shifting, and petitioner's constitutional rights were not violated thereby.

Use of Petitioner's Statements and Allegedly Unconstitutionally Seized Evidence

As previously indicated, the court has examined the record and is satisfied that each of petitioner's statements to the police was made pursuant to a valid, voluntary relinquishment of his constitutional rights after adequate *Miranda* warnings were given. For this reason, petitioner's claim that these statements were impermissibly entered into evidence at his trial is without merit. The same applies to his claim of the use of unconstitutionally seized evidence, since the record indicates that the search and seizure were consented to.

Prosecutor's Use of Peremptory Strikes

Regarding petitioner's claim that the prosecutor utilized his peremptory strikes to eliminate black persons from the jury that heard the 1974 trial, the court concludes that this objection was waived when not made at trial, and in any event petitioner's rights were not violated thereby. *See Swain v. Alabama*, 380 U.S. 202 (1965); *United States v. Williams*, 446 F.2d 486 (5th Cir. 1971).

THE 1977 TRIAL

Most of the issues presently before this court were raised by petitioner in his direct appeal to the Georgia Supreme Court as well as in his state habeas proceeding. This, of course, is no bar to a reexamination by this court. As was stated in *West v. State of Louisiana*, 478 F.2d 1026

(5th Cir. 1973), *panel opinion aff'd and adhered to in relevant part*, 510 F.2d 363 (5th Cir. 1975) (en banc):

> Regardless of the thoroughness of state factfinding procedures, considerations of comity do not obligate federal courts in habeas corpus cases to defer to state determinations on matters of federal law. The obligation of the federal judge is the opposite: to apply the proper federal constitutional standards based on the underlying facts, although the conclusions drawn from the facts may differ from the state court's conclusions.

478 F.2d at 1031-1032 (citations omitted). After reviewing the record before it, this court has concluded that petitioner's challenges to his 1977 sentence are without merit.

Jury Composition Challenge

Petitioner first alleges that the jury which sentenced him to death was drawn from an unconstitutionally composed traverse jury pool. This issue was first raised by petitioner's counsel at his 1977 sentencing trial. Assuming, without deciding, that the petitioner has made out a prima facie violation of both equal protection, see *Castenada v. Partida*, 430 U.S. 482 (1977), and the fair cross-section requirement of the Sixth Amendment, *see Duren v. Missouri*, 439 U.S. 357 (1979), the court concludes that such a prima facie case has been adequately rebutted by the state. Petitioner's jury composition challenge is based on his allegations of a significant underrepresentation of women, black persons, and persons aged 18-30, resulting from the utilization of a selection procedure that was susceptible of abuse. However, the record shows that only two jury commissioners apparently used nonrandom selection processes in choosing potential jurors. Although these nonrandom selection methods could have been

potentially discriminatory, the court concludes that the testimony of the jury commissioners which was elicited at the time this motion was heard by the trial court reveals that they in fact were not. One of the jury commissioners, Julian Jones, testified that he first used a random selection process, but after discovering that he was 700 names short, he went through the voter registration list and used a subjective standard, selecting "[j]ust any type of people we thought would serve as good jurors." Although the latter method had the potential for abuse, the witness testified that he attempted to choose a substantial number of blacks, women, and young people, and that no members of any of the aforementioned groups were purposefully excluded. The other jury commissioner who employed a nonrandom method, Lavinia Morgan, testified that she never purposefully excluded women, blacks, or young people, and moreover that "occasionally when I recognized a name and I knew that person to be black, and sometimes a black woman, I purposely checked that name." This testimony was unimpeached and there was no evidence to the contrary. The court therefore concludes that this ground is without merit.

Objections Regarding Individual Jurors

Although petitioner has also alleged that several jurors were improperly excluded in violation of *Witherspoon, supra*, the court has reviewed the transcript of the voir dire examination and concludes that the trial court properly applied the standards enunciated by the United States Supreme Court. Petitioner has also objected to the trial court's failure to exclude several jurors expressing fixed opinions on punishment and a juror who would give a presumption of truth to police testimony. Having reviewed the voir dire examinations of the jurors in question, the

court concludes that these grounds are also without merit. Nor does the court find that petitioner's counsel was improperly restricted in his voir dire of these or other prospective jurors.

Proceeding to Disqualify Trial Judge and Denial of Funds

Although petitioner complains that the proceeding to determine whether the trial judge should have been disqualified was improper and that his motion in this regard should have been granted, the record does not indicate that the state judge who presided over petitioner's trial was in any way discriminatory or biased against petitioner. Therefore, this ground is without merit. The court also concludes that petitioner's rights were not violated when his motion for funds for expert witnesses and investigators was denied, since petitioner has cited no authority, nor has the court been able to discover any, for the proposition that an indigent defendant is constitutionally entitled to such funds. In this regard, the court notes that several individuals testified as experts at petitioner's trial despite the denial of funds.

Instructions to Jury

Although petitioner contends that the trial court's instructions as to the aggravating circumstance found in *Ga. Code Ann.* § 27-2534.1(b)(7) were inadequate, the court observes that the trial court charged as to the meaning of "aggravated battery," that such charge was justified by the evidence in the case, and that this aggravating circumstance was not applied in an unconstitutionally vague or overbroad manner. In addition, the court concludes that the trial court's instructions on impeachment of witnesses and on mitigating and aggravating circumstances were, when taken in their entirety, proper and adequate.

Remaining Objections

The court has previously found that petitioner's statements which were entered into evidence were not unconstitutionally obtained. The court also concludes that the prosecutor's use of peremptory challenges did not deprive petitioner of his constitutional rights, and that the denial of a motion for change of venue was properly within the trial court's discretion. The court finds that even assuming that the prosecutor's closing argument was in part improper, any such impropriety did not rise to constitutional dimensions. Petitioner's claim that his previous convictions that were entered into evidence were unconstitutionally obtained is without merit, inasmuch as he failed to make an adequate showing at the state level (despite the opportunity to present evidence) that he was unrepresented by counsel at the time of these convictions. Nor was the introduction of noncapital convictions or length of sentence improper under Georgia law, *Davis v. State, supra,* 241 Ga. at 383-384, and this court finds no constitutional violation thereby. Finally, petitioner's argument that the death penalty is unconstitutional in general and as applied to petitioner must be rejected. *Smith v. Balkcom,* 660 F.2d 573 (5th Cir. 1981), *modified,* 671 F.2d 858 (5th Cir. 1982).

For all of the foregoing reasons, the petition for writ of habeas corpus is hereby denied.

SO ORDERED, this 19 day of November, 1982.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

APPENDIX B

Curfew DAVIS, Plaintiff-Appellant,

v.

Walter D. ZANT, Warden, Georgia Diagnostic and Classification Center, Defendant-Appellee.

No. 83-8244.

United States Court of Appeals, Eleventh Circuit.

Dec. 27, 1983.

Rehearing En Banc Granted March 6, 1984.

Petitioner, who was convicted of murder in Georgia state court and sentenced to death, appealed from an order of the United States District Court for the Northern District of Georgia, G. Ernest Tidwell, J., which denied his petition for writ of habeas corpus. The Court of Appeals, Fay, Circuit Judge, held that: (1) petitioner demonstrated that he was sentenced in 1977 before an unconstitutionally composed jury; (2) evidence supported trial court's determination in murder case that those jurors excused for cause during jury selection for petitioner's resentencing trial had a state of mind such that they could not vote for the death penalty regardless of any evidence which might have been presented at trial and regardless of the law; and (3) in view of curative language to effect that presumption of malice could be rebutted by defendant from evidence offered by him from evidence offered by the state or from both, challenged language contained in instruction to effect that the law presumes malice when a homicide has been shown did not unconsti-

tutionally shift burden of proof in violation of petitioner's rights under *Sandstrom v. Montana*.

Reversed and remanded.

Opinion on Rehearing, 728 F.2d 492.

Kravitch, Circuit Judge, filed opinion concurring in part and dissenting in part.

1. Constitutional Law 250.2(1, 4)

Discriminatory selection of grand and traverse juries in state court may be challenged under equal protection clause of Fourteenth Amendment. U.S.C.A. Const. Amend. 14.

2. Jury 33(1.1)

Right to have a jury venire represent a fair cross section of the community is protected by Sixth Amendment's guarantee of trial by an impartial jury. U.S.C.A. Const. Amend. 6.

3. Constitutional Law 250.2(4)

Jury 33(1.1)

Prima facie tests for challenges to composition of jury based on either equal protection clause of Fourteenth Amendment or based upon Sixth Amendment's guarantee of trial by an impartial jury are almost identical. U.S.C.A. Const.Amends. 6, 14.

4. Jury 33(1.1)

Elements of prima facie violation of fair cross section requirement of Sixth Amendment requires that a defendant show that group alleged to be excluded is a "distinctive" group in the community, that the representation of that group in venires from which juries are selected is not

fair and reasonable in relation to the number of such persons in the community, and that such underrepresentation is due to systematic exclusion of the group in the jury selection process. U.S.C.A. Const.Amend. 6.

5. Habeas Corpus 85.5(12)

Petitioner demonstrated that he was sentenced in 1977 before an unconstitutionally composed jury. U.S.C.A. Const.Amend. 6; Ga.Code, § 59-106.

6. Jury 33(2.1)

Evidence supported trial court's determination in murder case that those jurors who were excused for cause during jury selection for petitioner's resentencing trial had a state of mind such that they could not vote for the death penalty regardless of any evidence which might have been presented at trial and regardless of the law.

7. Crimina l Law 778(5)

In view of curative language to effect that presumption of malice could be rebutted by defendant from evidence offered by him or from evidence offered by the state or from both, challenged language contained in instruction to effect that the law presumes malice when a homicide has been shown did not unconstitutionally shift burden of proof in violation of petitioner's rights under *Sandstrom v. Montana*.

8. Habeas Corpus 113(12)

Issue as to whether petitioner's death sentence should be overturned because statutory section authorizing a judge to include in his instructions for jury to consider in their sentencing deliberations the fact that the offense was outrageously or wantonly vile was applied unconsti-

tutionally in petitioner's resentencing trial was moot where petitioner was given another sentencing trial on ground that he was sentenced before an unconstitutionally composed jury. Ga.Code, § 27-2534.1(b)(7).

9. Criminal Law 641.13(2)

Petitioner's counsel at his original trial met the constitutional standards for effective assistance of counsel in that he was not errorless but was reasonably likely to render and rendered reasonably effective assistance.

10. Criminal Law 414

Evidence supported findings that petitioner's conversations with police during in-custody investigation were initiated by petitioner and that petitioner voluntarily waived his right to silence and his right to counsel prior to each discussion.

11. Criminal Law 1208.1(6)

Georgia law permitted the introduction of petitioner's noncapital convictions and length of sentences in sentencing trial after he had been found guilty of murder.

12. Habeas Corpus 54

General allegations of bias on part of sentencing trial judge did not support granting of federal habeas corpus relief.

Joseph M. Nursey, Atlanta, Ga., for plaintiff-appellant.

Susan V. Boleyn, William B. Hill, Jr., Asst. Attys. Gen., Atlanta, Ga., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before FAY and KRAVITCH, Circuit Judges, and ATKINS*, District Judge.

FAY, Circuit Judge:

Petitioner, Curfew Davis, was convicted of murder in Georgia state court in 1974 and was sentenced to death for the murder charge. After an unsuccessful effort to obtain a writ of habeas corpus in state court, Davis brought this petition for a writ of habeas corpus under 28 U.S.C. § 2254 (1976). The district court denied the petition without holding an evidentiary hearing. We reverse and grant relief.

Davis raises nine issues before this court: (1) whether petitioner's sentencing trial was conducted before a jury whose composition violated the Sixth and Fourteenth Amendments; (2) whether prospective jurors at petitioner's sentencing trial were excluded in violation of *Witherspoon v. Illinois;* (3) whether the trial court's instruction to the jury during petitioner's 1974 culpability trial improperly shifted the burden of proof on the element of malice; (4) whether petitioner's death sentence was based on an unconstitutional application of statutory aggravating circumstances; (5) whether petitioner was denied effective assistance of counsel at his 1974 culpability trial; (6) whether statements made by petitioner pursuant to police in-custody interrogrations were unconstitutionally obtained; (7) whether the prosecutor's closing argument during the 1977 resentencing trial rendered petitioner's sentence fundamentally unfair; (8)

*Honorable C. Clyde Atkins, U.S. District Court Judge for the Southern District of Florida, sitting by designation.

whether petitioner's prior convictions were improperly admitted as aggravating circumstances in support of his death sentence; and (9) whether petitioner was denied due process of law and his right to an impartial judge due to the nature of the proceedings to disqualify the trial judge prior to petitioner's resentencing trial. The first issue is dispositive of this appeal.

PROCEDURAL HISTORY

Based upon a series of events occurring in and around LaGrange, Georgia on July 19, 1974,[1] Curfew Davis, a black male, was charged in the Superior Court of Troup County, Georgia with first-degree murder. The victim was a young white woman who had been temporarily in LaGrange on a work assignment to pick up laboratory supplies from the LaGrange Women's Clinic. The trial jury found Davis guilty of the murder charge and pursuant to the Georgia bifurcated trial procedure the jury recommended that Davis be sentenced to death. The trial judge subsequently entered findings and imposed the death sentence.

Davis appealed to the Supreme Court of Georgia which affirmed the convictions and the sentence. *Davis v. State*, 236 Ga. 804, 225 S.E.2d 241 (1976). The United States Supreme Court granted certiorari, vacated petitioner's death sentence due to a violation of the *Witherspoon* standards as to one prospective venireperson, and remanded for a new sentencing trial. *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976).

Petitioner was retried on the sentencing issue only in June 1977 and was again sentenced to death by a jury in

[1] The historical facts are set out in more detail in *Davis v. State*, 236 Ga. 804, 225 S.E.2d 241 (1976).

the Superior Court of Troup County. The Supreme Court of Georgia affirmed, *Davis v. State*, 241 Ga. 376, 247 S.E.2d 45 (1978), and the United States Supreme Court denied certiorari. *Davis v. Georgia*, 439 U.S. 947, 99 S.Ct. 341, 58 L.Ed.2d 338 (1978).

Petitioner then filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia, which was denied in April 1981. The Georgia Supreme Court denied an application for certificate of probable cause to appeal the judgment of the Superior Court, and the United States Supreme Court denied certiorari. *Davis v. Zant*, 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed.2d 692 (1982).

Davis then filed the present petition for writ of habeas corpus in the United States District Court for the Northern District of Georgia and thereafter filed a motion for an evidentiary hearing. The district court denied both the motion and the petition, and Davis appealed to this court.

The instant habeas petition raises issues with respect to petitioner's 1974 trial and his 1977 resentencing trial.

I. THE JURY COMPOSITION CHALLENGE

Petitioner alleges that in his 1977 resentencing trial conducted in the Superior Court of Troup County he was sentenced by an unconstitutionally composed jury. Specifically, Davis alleges that both blacks and women were underrepresented in the 1975 Troup County traverse jury pool from which the jury that sentenced him was drawn.

At the pretrial hearing on the jury composition issue, uncontroverted evidence was introduced concerning the breakdown by race, sex and age of the 1975 traverse jury pool that was compiled in August 1975 and similar break-

downs in the 1970 census figures [2] for Troup County. These figures indicate disparities [3] of −18.4% between the percentage of women in Troup County and the percentage of women on the list for the traverse jury. The disparity between the number of blacks in the county population and those on the traverse jury list is −18.1%. Similar figures comparing the 1973 traverse jury pool with the 1970 census results indicate a disparity of −12.6% between the percentage of women in the county and their percentage on the 1973 list;[4] the disparity between the number of blacks in the population and their representa-

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[2] The use of five-year-old census data is appropriate when there is no evidence that use of the data distorted the actual number of women or blacks in Troup County at the time of trial. The Supreme Court has approved the use of six-year-old census data. *Duren v. Missouri*, 439 U.S. 357, 365 & n. 24, 99 S.Ct. 664, 669 & n. 24, 58 L.Ed.2d 579 (1979); *Alexander v. Louisiana*, 405 U.S. 625, 627, 92 S.Ct. 1221, 1223, 31 L.Ed.2d 536 (1972).

[3] The disparities are taken from figures presented to the trial court which were drawn from the 1970 State of Georgia Census by the United States Department of Commerce and from the 1975 Troup County traverse jury lists. An analysis of the 1975 lists by sex and race as compared to the 1970 county census shows:

	Men	Women	White	Black
Census	47.1%	52.9%	68.2%	31.8%
% in Jury Pool	65.5%	34.5%	86.3%	13.7%
Disparity	+18.4%	−18.4%	+18.1%	−18.1%

R.Vol. 4 at 53–56, 154–55.

[4] The analytical breakdown of the 1973 traverse jury list as compared to the 1970 census figures shows:

	Men	Women	White	Black
Census	47.1%	52.9%	68.2%	31.8%
% in Jury Pool	65.5%	40.3%	86.3%	13.7%
Disparity	+12.6%	−12.6%	+18.1%	−18.1%

R.Vol. 4 at 53–55, 154–55.

tion on the 1973 list is −18.1%.[5]

The importance of having a jury represent all portions of the community has often been emphasized in judicial decisions. *See, e.g., Peters v. Kiff*, 407 U.S. 493, 503, 92 S.Ct. 2163, 2168, 33 L.Ed.2d 83 (1972). The importance of affording a defendant trial by a representative jury of his peers is magnified in capital cases, where juries are required to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (emphasis in original).

[1-4] Discriminatory selection of grand and traverse juries in state court may be challenged under the equal protection clause of the Fourteenth Amendment, *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). The right to have a jury venire represent a fair cross-section of the community is also protected by the Sixth Amendment's guarantee of trial by an impartial jury. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). The prima facie tests for an equal

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[5] During the hearing, the trial court refused to accept any evidence concerning the composition of the grand jury pools in Troup County; the court held such evidence to be irrelevant to a traverse jury challenge. R.Vol. 4 at 73–74. Petitioner sought to introduce this evidence as further proof of discrimination in the composition of the county's jury pools and as further evidence of the intent to discriminate on the part of the jury commissioners, who were responsible for compiling both the grand jury and traverse jury pools. R.Vol. 4 at 73–74; Vol. 5 at 64–65. We have serious doubts as to the exclusion of this evidence, as such figures could well buttress the conclusion that the disparity is not due to chance or inadvertence but results from discrimination. On these particular facts, however, such additional evidence is not essential to the disposition of the case.

protection claim and a fair-cross-section claim are almost identical.[6] In *Castaneda v. Partida*, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977), the Supreme Court summarized the requirements for proving an equal protection violation:

> The first step is to establish that the group is one that is a recognizable, distinct class, ... Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. . . . Finally, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

In *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979), the elements of a prima facie violation of the fair-cross-section requirement were set out:

> [T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

[5] The first part of the prima facie test under *Castaneda* or *Duren* is clearly satisfied in this case because both black persons, *Strauder v. West Virginia*, 100 U.S. 303, 25

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[6] The two analyses do differ in the way the prima facie case is rebutted. Compare *Castaneda v. Partida*, 430 U.S. at 497–98, 97 S.Ct. at 1281–1282 (prima facie case rebutted by proving absence of discriminatory intent) with *Duren v. Missouri*, 439 U.S. at 367–68, 99 S.Ct. at 670 (prima facie case rebutted by proving significant governmental interest justifying the imbalance of classes). Because we conclude that the state's rebuttal consisted of mere affirmations of good faith which did not approach the threshold of either standard of proof, this distinction is not important for this case.

L.Ed. 664 (1879), and women, *Taylor v. Louisiana, supra,* constitute recognizable, distinct classes.

Although the Supreme Court has been careful not to delineate precise mathematical standards for proving systematic exclusion, *Alexander v. Louisiana, supra,* 405 U.S. at 630, 92 S.Ct. at 1225, Supreme Court, Fifth Circuit,[7] and Eleventh Circuit precedent furnish guidance in judging whether the disparities here are significant enough to establish an equal protection or fair-cross-section claim. It is evident that the disparities present here, ranging from 18.1% to 18.4% as to the critical 1975 traverse jury pool, are extremely close to the disparities found significant in other cases.[8] *E.g., Turner v. Fouche,* 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970) (23% disparity); *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (14%); *Gibson v. Zant,* 705 F.2d 1543 (11th Cir.1983) (21% and 38%); *Machetti v. Linahan,* 679 F.2d 236 (11th Cir.1982), *cert. denied,* ____ U.S. ____, 103 S.Ct. 763, 74 L.Ed.2d 978 (1983) (36% and 42%); *Porter v. Freeman,* 577 F.2d 329 (5th Cir.1978) (20.4%). In addition, the evidence that the disparities in the 1973 list

[7] Decisions of the Fifth Circuit handed down prior to September 30, 1981, are binding precedent on this Court unless and until overruled or modified by this Court en banc. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[8] The Supreme Court of Georgia apparently ignored this precedent in ruling on the adequacy of the statistical disparity. On direct appeal, the Supreme Court of Georgia held that "given the neutral selection method primarily used by the Troup County jury commissioners, the statistical disparity between the percentage of blacks eligible for jury service and the percentage of blacks in the 1975 traverse jury list affords no ground for relief." 241 Ga. at 379–80, 247 S.E.2d at 48–49. The court recited the figures for the 1975 traverse jury list, but did not distinguish the present case from existing United States Supreme Court precedent which had found similar disparities to be unconstitutional. The court did not discuss the statistics as they related to women, nor did it discuss the 1973 pool.

were in the same range as those in the 1975 list corroborates petitioner's claim that the 1975 figures are not coincidental but result from discrimination.

The third part of the prima facie test is also met here because petitioner has demonstrated that the selection procedures used by the jury commissioners of Troup County were manifestly "susceptible of abuse" and were not "racially [or sexually] neutral." *Castaneda v. Partida, supra*, 430 U.S. at 494, 97 S.Ct. at 1280. Georgia Code § 59-106,[9] in effect when the 1975 Troup County jury lists were compiled, sets out the procedures to be followed by jury commissioners in composing a jury list:

> At least biennially, or, if the chief judge of the superior court shall direct, at least annually, the board of jury commissioners shall compile, and maintain, and revise a jury list of intelligent and upright citizens of the county to serve as jurors. In composing such a list the commissioners shall select a fairly representative cross-section of the intelligent and upright citizens of the county from the official registered voters' list of the county as most recently revised by the county board of registrars or other county election officials. If at any time it appears to the jury commissioners that the jury list, so composed, is not a fairly representative cross-section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly represented on the jury list.

The Georgia legislature, aware of the constitutional problems surrounding the selection of grand and traverse

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[9] The language of this section has been slightly modified and it has been renumbered as § 15–12–40 (1982) in the current Georgia

juries, enacted this section in 1968 in an attempt to statutorily comply with the decisions of the Supreme Court. We applaud the initiative of the legislature; however, as the Supreme Court explained in addressing the constitutionality of this particular provision in *Turner v. Fouche, supra,* the Georgia system of selecting juries, while not "inherently unfair", 396 U.S. at 355, 90 S.Ct. at 537, contains the possibility of abuse. Furthermore, the Court warned that a disparity is particularly suspect when it "originate[s], at least in part, at the one point in the selection process where the jury commissioners invoke[ ] their subjective judgment rather than objective criteria." 396 U.S. at 360, 90 S.Ct. at 540. *Accord Foster v. Sparks,* 506 F.2d 805, 810 (5th Cir.1975).

The testimony of the jury commissioners at petitioner's 1977 pre-trial hearing on the jury composition issue demonstrates that the 1975 jury selection procedure in Troup County did not comply with the dictates of Georgia law and Supreme Court decisions that a "fairly representative cross-section" of the county's citizens be selected for jury service. Six of the eight commissioners charged with selection of the 1975 pool testified. The commissioners stated that they were directed by the county clerk's office to utilize only the registered voters' list in selecting the jury pools. No commissioner could recall being given any indication of the statute's obligation to go beyond the voters' list if necessary to obtain a pool representative of the racial and sexual makeup of the community.[10] Our courts have sanctioned the use of voter registration lists as the sole means of jury selection. *See Turner v. Fouche, supra,* and *Foster v. Sparks, supra;* however, the use of such lists does not establish as a con-

[10] *E.g.,* R.Vol. 4 at 168, 180–181; Vol. 5 at 65, 194–96.

clusive fact that a true cross-section of the community is being drawn.

The commissioners' testimony further demonstrates that the jury selection process was a system easily capable of being manipulated, and a system which is obviously not "facially neutral" as mandated by *Castaneda* and *Duren*. Although four of the six 1975 commissioners who testified, each of whom was responsible for selecting juries from a particular precinct, maintained that they used a random selection method in that they picked every fifth, or in some cases every sixth, name from the voters' list,[11] the fact remains that a significant proportion of the 4015 names on the list were selected through subjective means.

Specifically, Commissioner Julian Jones admitted that he, in corroboration with other commissioners, hand-picked 700 of the 4015 total persons on the 1975 pool by choosing persons that "we knew or thought would make a good juror." [12] Commissioner Lavinia Morgan initially

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[11] R.Vol. 4 at 165–66, 168, 178–79, 191, 193–95, 205–07, 214.

[12] Commissioner Jones' full testimony in this regard, on direct examination, was as follows:

Q. Can you tell me how you selected the 1975 list?

A. We went down the line and counted off numbers in sequence, the sixth one.

Q. All right, sir. And you did this by districts and not by the county at large; is that correct?

A. That's correct.

Q. What district did you do, sir?

A. The Mountville district. Of course, we all went back together and checked over the list completely.

Q. What did you check over?

A. We didn't have enough names.

Q. All right. How did you do it?

A. We just went back and checked the names off of the people we knew or thought would make a good juror.

testified that she chose every sixth name on her voters' list for inclusion in the pool. However, when it was pointed out to Ms. Morgan that at one point she had checked four names in a row, at another point had checked five names in a row and at still another point had checked sixteen consecutive names, she conceded that she had not in fact used a random method at all.[13] It was also appar-

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Q. And placed them in addition to the other jurors?
A. That's right. When we wound up we had 3,500 jurors.
Q. How many did you have the first time before you started putting in people you thought—
A. 2,800.
Q. And then the others, you just went through and selected people you thought would make good jurors?
A. That's right.
Q. And that's on the '75 list?
A. Yes.
Q. And on the '73 list?
A. We had enough.
Q. It was just in the '75 list that you put in the names you thought would make good—
A. We didn't have enough when we got through.

R.Vol. 5 at 8–9.

[13] Commissioner Morgan gave the following testimony on direct examination:

Q. Would you tell me how you used those lists?

* * * * * *

A. We were told to get a certain number and I went down the list checking and when I didn't get enough, I went back and checked some more.
Q. All right. And these checks on the list, are those your checks?
A. I suppose so.
Q. All right. Tell me how you went down the list checking.
A. Well, it was suggested that we get maybe every sixth person so we'd be sure to get a cross-section. But it looked like that was not going to be enough so I went back and just checked some more.
Q. All right. How did you get those others that you checked?
A. I had no particular plan.

ent from the commissioners' testimony that several of them knew the race and sex of many names on the registered voters' list; a procedure whereby these known factors can be easily incorporated as selection criteria is far from "facially neutral."[14] Moreover, the commis-

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Q. You just got people that you knew?
A. I got as many as I needed.
Q. Explain that, if you would.
A. Well, you know, it's hard to tell you how a woman checks a list.
Q. A person checks a list, you mean? A woman is no different than any other person as far as checking the list.
A. I'm speaking for myself.
Q. All right. Well, there's no pattern of checking every sixth name on the list, is there?
A. No.
Q. I mean, I notice that the first is checked, the next four are checked, then I notice on this side there's five in a row checked. Then I notice there are four in a row checked and then I notice in the center column there's four checked in a row. One skipped, two checked. And then I notice that there are sixteen skipped in the middle row.
A. Well, I had no particular plan.
Q. And so then it wasn't just a matter of checking every sixth name and putting it on the jury list as far as West Point is concerned?
A. Well, I checked until I got enough names.
Q. All right. But you didn't check in any type of pattern though?
A. Not particularly; no.

R.Vol. 5 at 33–35.

[14] *See, e.g.*, Morgan's testimony on cross-examination:

Q. And a lot of the people you had on there, you really weren't too sure whether they were black or white?
A. Right.
Q. Did you ever not let anybody serve on the jury because that person happened to be black?
A. No. On the contrary, occasionally when I recognized a name and I knew that person to be black, and sometimes a black woman, I purposely checked that name.

R.Vol. 5 at 40.

sioners conceded in testimony that the prescribed method of choosing every sixth name produced only 2800 names. The commissioners then went back over the list in an attempt to produce the 3500 names which had been requested of them; as a result of the list's reworking, the commissioners somehow ended up with a list of 4015 names. Not a single commissioner was able to definitively describe the selection procedure which was employed in selecting the second group of names. Such inability to account for the procedures used in selecting over one quarter of the jury pool certainly causes us to question the state's asserted "random" methods.

A jury selection procedure that is as easily capable of being manipulated as the Troup County process goes far in supporting the presumption of discrimination urged by the petitioner based upon the 18.1% and 18.4% disparities demonstrated. In our opinion, petitioner has proved that these variances, in light of the highly subjective selection procedures utilized in the 1975 jury selection process, are unconstitutional absent a showing by the state that "racially neutral selection procedures have produced the monochromatic result." *Alexander v. Louisiana*, 405 U.S. at 632, 92 S.Ct. at 1226.

In rebuttal to the prima facie case, the state offered only the testimony of the jury commissioners that they had not discriminated on the basis of race or sex. However, the Supreme Court has repeatedly declared that such affirmations of good faith are "insufficient to overcome the prima facie case." *Whitus v. Georgia*, 385 U.S.

The state argues that such testimony demonstrates the lack of discriminatory intent on the part of the jury commissioners; on the contrary, such acknowledged familiarity with the sexual and racial characteristics of the voter's list is precisely the type of knowledge which renders the selection process subject to abuse.

545, 551, 87 S.Ct. 643, 647, 17 L.Ed.2d 599 (1967); *Alexander v. Louisiana, supra*, 405 U.S. at 632, 92 S.Ct. at 1226; *Turner v. Fouche, supra*, 396 U.S. at 361, 90 S.Ct. at 540; *Norris v. Alabama*, 294 U.S. 587, 598, 55 S.Ct. 579, 583, 79 L.Ed. 1074 (1935).

Since petitioner has demonstrated that he was sentenced in 1977 before an unconstitutionally composed jury, we must grant relief and remand this case for yet another sentencing trial.

II. THE WITHERSPOON CLAIM

[6] During jury selection for Davis' 1977 resentencing trial, the trial court excused venirepersons Ruben Haynes, Theotis Davenport and Willie Cooper because they expressed opposition to the death penalty. Davis argues that their dismissal was unconstitutional under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Although the *Witherspoon* issue as it relates to the venirepersons at issue here is not dispositive of this appeal inasmuch as the jury composition challenge has been found to warrant a new sentencing trial for Davis, the issue is a serious one which merits some discussion.

In *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the Supreme Court recently reaffirmed that exclusion of a venireperson because of his opposition to the death penalty is permitted only if the venireperson clearly indicates that he would always vote against the death penalty or that his opposition to the death penalty would impair his ability to discharge his duties as a juror:

> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact ex-

> cluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*

Id. at 44, 100 S.Ct. at 2526 (quoting *Witherspoon*, 391 U.S. at 522 n. 21, 88 S.Ct. at 1777 n. 21) (emphasis in original).

We conclude that the record supports the trial court's determination that those jurors who were excused for cause had a state of mind such that they could not vote for the death penalty regardless of any evidence which might have been presented at trial and regardless of the law.

Davis contends that the responses of Haynes, Davenport and Cooper did not demonstrate either that they would automatically vote against the death penalty or that their opposition to the death penalty would affect their ability to make an impartial decision as to guilt. Relying on *Granviel v. Estelle*, 655 F.2d 673, 677 (5th Cir. 1981), *cert. denied*, 455 U.S. 1003, 1007, 102 S.Ct. 1636, 1644, 71 L.Ed.2d 870, 875 (1982), Davis argues that the responses of the venirepersons fell short of the unequivocal statement of opposition necessary to permit exclusion.

During the examination of venireperson Haynes, Haynes stated several times that he could not and would not vote for imposition of the death penalty regardless of the circumstances.[15] Although several of Haynes' state-

[15] The entire colloquy between venireperson Haynes and petitioner's attorney is as follows:

> Q. Mr. Haynes, I ask you this question: Are you conscientiously opposed to capital punishment?

ments by themselves do not suggest a clear and unambiguous statement of opposition, it is evident that Haynes' numerous affirmations of objection to the death penalty

A. Am I opposed to it?

Q. Yes.

A. Well, I see it like this: I feel like if you kill a person, it's not going to bring a person back to life. I think if a person is going to do something like that, he should work and his labor be furnished to the State and the person go to a farm.

Q. Yes, sir. I understand that. So, do you believe in capital punishment?

A. No.

Q. You are opposed to capital punishment?

A. Yes.

Q. All right. Now, I'm going to ask you this question: Would your attitude towards capital punishment cause you to automatically vote against imposing the death penalty without regard to what evidence might be developed in the trial?

A. State that again.

Q. Would your attitude towards capital punishment that you have cause you to automatically vote against imposing the death penalty without any regard to the evidence that might be developed in the case in the trial, in the case before you?

A. No.

Q. Would you be willing to impose capital punishment if you thought the evidence justified it?

A. Well, like I said, you know, it's not going to bring the person back.

Q. We're all aware of that, sir. My question is would you be willing to impose capital punishment if you thought the evidence justified it?

A. Well, taking the person's life isn't going to bring the person back.

* * * * * *

Q. My question to you is: Could you give a person capital punishment under any circumstances?

A. Well, I guess, it depends on the circumstances I guess. That would have something to do with it.

Q. Yes, sir. Could you under certain circumstances give somebody capital punishment?

A. Well, I'd have to do some thinking on that.

Q. Pardon?

remove any ambiguity which may have existed. By indicating that his reservations about the death penalty were such that he would "automatically vote against imposing

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A. Well, I'd have to look into it and think about it really.

* * * * * *

Q. All right, sir. What I want to know is is this feeling that you have about capital punishment so strong that you never would given it to anybody no matter what the evidence was?

A. The way I feel about it, I wouldn't. Like I said, it's not going to bring that person back. That's what I'm saying sir.

Q. So, you're saying that you would not give anybody capital punishment?

A. Sir, it would depend on the circumstances.

MR. KENDALL: Your Honor, I think that this juror has answered Mr. Lee's questions by saying that it would depend on the circumstances; and I think that again he is exactly the kind of juror we're willing to take.

THE COURT: I agree with you, but I think we're entitled to an answer. I don't think we've gotten a full answer. I agree with you, but I think we're entitled to a full answer.

BY MR. LEE:

Q. Tell me.

A. Okay. I would not give it to anybody.

Q. You would not give it to anybody?

A. That's right.

Q. Under any conditions?

A. No. That's not going to bring that person back.

MR. LEE: I think by his own statement he's explained his answer to the question. I think he can be excused for cause, Your Honor.

MR. KENDALL: Your Honor, may I examine?

THE COURT: Yes.

BY MR. KENDALL:

Q. Mr. Haynes, I'm not trying to put words in your mouth at all. This is as you probably know a proceeding simply to decide sentence in this case; in other words to choose between a sentence of life imprisonment and the death penalty for murder. Now, you haven't of course heard the evidence in this case; and I'm not asking you to make a judgment on evidence that you haven't heard. The question I would like to hear from you on is whether your mind is so closed against the death penalty that you would be unable to listen fairly to the

[it] without regard to what evidence might be developed in the trial," Haynes clearly met the standards for exclusion enunciated in *Witherspoon*. *See Witherspoon*, 391 U.S. at 522 n. 21, 88 S.Ct. at 1777 n. 21. The responses of Davenport and Cooper to the same line of questioning are clear and unambiguous statements of opposition to the death penalty.[16]

III. THE SANDSTROM CLAIM

[7] During the 1974 culpability phase of Davis' trial, the trial court charged in its instructions to the jury, that "it is true that the law presumes malice when a homicide has been shown, yet that presumption of malice may be rebutted by the defendant from evidence offered by him

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evidence and the instructions of the trial court and consider the evidence in this case and consider those instructions and consider the possibility of imposing the death penalty?

A. Well, sir, it's like this. I don't know anything about this man. I don't know whether the man is guilty or not guilty. I haven't made no decision about it.

Q. Considering that you have not heard the evidence in this case, are you able to say unequivocally that you would automatically vote against the death penalty no matter what that evidence showed?

A. Well, I mean it would be different. Like I said, if you've got concrete evidence, it's a different story, you know.

Q. Excuse me, sir, if I may interrupt again. The evidence of guilt or innocence is not going to be a factor in this case. The evidence may come in, but that won't be the issue that you're going to decide. The question is simply whether you could consider after hearing the evidence the death penalty.

A. Would I consider it?

Q. Whether you could consider it as punishment?

A. Now if I wasn't sure, I couldn't consider it.

MR. KENDALL: Your Honor, we submit that this juror is qualified.

THE COURT: Excused for cause. You may get out.

R.Vol. 11 at 25–31.

[16] *See* R.Vol. 11 at 45–46; Vol. 8 at 99–100.

or from evidence offered by the state or from both."[17] Davis contends that this instruction violated his rights under *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and that this violation requires reversal of his conviction.

In *Sandstrom*, the Supreme Court found the language "the law presumes . . .," when used in reference to an essential element of a crime, susceptible of interpretation as creating a mandatory presumption and therefore unconstitutional absent neutralizing instructions. *Sandstrom v. Montana*, 442 U.S. at 515, 99 S.Ct. at 2454. This Court has likewise found a charge which stated that "the law presumes that every homicide is malicious until the contrary appears from circumstances of alleviation, excuse or justification," coupled with "it is incumbent upon the accused to make out such circumstances to your satisfaction unless they appear from the evidence produced against him . . ." to be unconstitutional when accompanied solely by the standard charge on burden of proof in a criminal case. *Lamb v. Jernigan*, 683 F.2d 1332, 1341 (11th Cir.1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983). The court in *Lamb* was concerned that the above instruction, standing alone, could have been read as shifting the burden of proof to the defendant on malice.

We find that the curative language " . . . or from evidence offered by the state or from both" which was present in the instructions given to the jurors in Davis' trial but absent from those read in *Sandstrom* and *Lamb*,[18]

[17] R.Vol. 1 at 207–10.

[18] The Supreme Court specifically noted that the jurors in *Sandstrom* "were not told that the presumption could be rebutted . . . by the defendant's simple presentation of 'some' evidence; nor even that it could be rebutted at all." 442 U.S. at 517, 99 S.Ct. at 2455, 61 L.Ed.2d at 46.

removes any possibility that the instruction may reasonably be interpreted as shifting the burden on malice. This Court has held that a malice charge containing the very similar curative language "but this presumption may be rebutted" is not unconstitutionally burden-shifting as such cautionary language refutes any claim that an irrebuttable presumption weighs against the defendant. *See Corn v. Zant*, 708 F.2d 549 (11th Cir.1983). The instructions in Davis' trial, combined with the general instructions that a defendant is presumed innocent until proven guilty and that the state has the burden of proving beyond a reasonable doubt all elements of the offense, therefore pass muster under the standards of *Sandstrom*.

IV. APPLICATION OF AGGRAVATING CIRCUMSTANCE "OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE OR INHUMAN"

[8] Petitioner contends that his sentence of death was based at least in part upon a jury finding of the aggravating circumstance defined in Ga.Code Ann. § 27-2534.-1(b)(7).[19] This statutory section permits a judge to include in his instructions for the jury to consider in their sentencing deliberations the fact that an offense of murder, rape, armed robbery or kidnapping was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim."[20] Petitioner further argues that his death sentence should be overturned because the section was applied unconstitutionally at his resentencing trial. In support of this argument, petitioner maintains that the code section was read to the jury without explanatory in-

[19] The language of this section has been renumbered as § 17-10-30(b)(7) (1982) in the current Georgia Code.

[20] A death sentence may not be imposed absent the finding, beyond a reasonable doubt, of a statutory aggravating circumstance. Ga. Code Ann. § 27–2534.1(c) [Ga.Code Ann. § 17–10–30(c) (1982)].

structions, which are mandated by the Supreme Court decision in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

This issue is moot insofar as petitioner will be retried on the issue of sentencing. However, we note that notwithstanding the merits of petitioner's claim as to the unconstitutionality of this section as applied, this claim is controlled by the Supreme Court's recent decision in *Barclay v. Florida*, ____ U.S. ____, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). A plurality of the court in *Barclay* held that where several aggravating factors are considered in arriving at a sentencing determination and one of those factors is improper, the improper factor is likely to be harmless error in instances where no mitigating factors are shown. In evaluating state court review of a sentencing procedure in which just such a circumstance obtained, the Court said that "[t]here is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance." *Barclay, supra*, 103 S.Ct. at 3428. At petitioner's resentencing trial, the jury found a second aggravating circumstance in the form of prior felony convictions and no mitigating circumstances were found in his favor. Under such circumstances, even a finding that one jury instruction was unconstitutionally applied would likely not entitle petitioner to a new sentencing hearing. It would be a factor to be duly considered by the Supreme Court of Georgia. We assume, however, that correct instructions will be given in the retrial.

V. EFFECTIVE ASSISTANCE OF COUNSEL

[9] Petitioner contends that he was denied the effective assistance of counsel at the culpability phase of his trial.

Petitioner presented these same claims of ineffectiveness to the state court in his state habeas corpus proceeding. The state trial judge held a hearing and found that petitioner was represented by reasonably competent and effective counsel.

The district court also carefully considered petitioner's claims of ineffective assistance of counsel and denied relief. The court set out and considered each of the specific allegations of ineffectiveness made by petitioner with respect to his counsel during the culpability trial, most of which had been presented in the state habeas proceeding:

(a) permitting the police to interrogate petitioner outside the presence of counsel;

(b) failure to conduct an independent investigation, interview witnesses, or to present evidence in petitioner's behalf;

(c) failure to adequately consult with petitioner;

(d) failure to file pretrial motions;

(e) failure to conduct an adequate voir dire of jurors;

(f) failure to file a motion for change of venue despite adverse pretrial publicity;

(g) failure to file a motion for funds for expert witnesses;

(h) failure to file a motion to suppress a .22 caliber pistol;

(i) failure to move to suppress statements made by petitioner to the police, although such statements were the result of an illegal arrest and interrogation without counsel's presence; and

(j) failure to challenge the grand and traverse jury pools in Troup County.

The court then independently reviewed the grounds alleged by the petitioner and made the following extensive findings:

(1) counsel conducted his own investigation;

(2) he also interviewed some witnesses, and attempted to interview others;

(3) petitioner has not suggested nor is it apparent to the court what evidence in his behalf should have been presented but was not;

(4) counsel consulted with petitioner on a significant number of occasions;

(5) counsel conducted an adequate voir dire examination of jurors;

(6) counsel's decision not to file a motion for change of venue was at the behest of petitioner;

(7) the evidence showed that the search and seizure of the pistol was consented to, justifying counsel's determination that a motion to suppress would have been fruitless;

(8) counsel made a reasonable decision that expert witnesses were not called for;

(9) inasmuch as it is permissible for a defendant to make in-custody statements to the authorities outside the presence of counsel where there is a voluntary relinquishment by the defendant of the right to have counsel present, *see Government of Canal Zone v. Sierra*, 594 F.2d 60 (5th Cir.1979), petitioner's allegation that his attorney was ineffective for allowing questioning in his absence is without merit, since the record shows the existence of a voluntary waiver by petitioner on each of the occasions that a statement was made;

(10) there is also no basis in the record for petitioner's assertion that the statements resulted from an illegal arrest; counsel was therefore not ineffective for failing to move to suppress such statements;

(11) petitioner's claim that counsel should have filed other, unspecified pretrial motions is without merit; and

(12) assuming without deciding that a successful jury composition challenge might have been brought, a finding of lack of effective assistance of counsel on this ground either alone or in conjunction with any other ground is unsupported by the evidence.

Based upon these findings and considering the totality of circumstances in the record, *Washington v. Estelle*, 648 F.2d 276, 279 (5th Cir.1981), the court concluded that petitioner's 1974 trial counsel met the constitutional standard for effective assistance of counsel in that he was not errorless but was "reasonably likely to render *and rendering* reasonably effective assistance." *See MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir.1960) (emphasis in original), *adhered to in pertinent part on rehearing en banc*, 289 F.2d 928, *cert. denied*, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961).[21] After a review of the district court's findings and the record on appeal, we must agree with the district court and reject petitioner's claims concerning counsel at his original trial.

VI. PETITIONER'S STATEMENTS TO POLICE DURING IN-CUSTODY INTERROGATION

[10] Petitioner contends that inculpatory statements made by him to police during in-custody investigations were unconstitutionally obtained and later introduced

[21] *See* R.Vol. 1 at 207–10.

against him at both the culpability phase and the resentencing phase of the trial.

Davis was arrested in July 1974 and for the next month was interrogated frequently in the county jail by police; Davis' counsel was not present at the interrogations. During the questioning by police, Davis made statements which increasingly linked him to the commission of the murder for which he was charged. Ultimately, in late August 1974, he led police to the location of the victim's body.[22] Davis contends that the in-custody interrogation was unconstitutional in that he did not make a proper waiver of the right to silence and the right to counsel. *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The record, however, demonstrates that petitioner was afforded a full and fair hearing on this issue in the district court. The district court concluded that each time Davis made a statement to the police, he voluntarily waived his right to remain silent and his right to counsel. This Court has long recognized that it is not unusual for an arrested person to voluntarily cooperate with law enforcement officials. Such cooperation may be prompted by a desire for leniency for himself or others; it may also represent a person's attempt to assuage feelings of guilt or remorse which resulted from his prior actions. *See, e.g., United States v. Robertson*, 582 F.2d 1356, 1368 (5th Cir.1978). The district court also noted that it is permissible for a defendant to make in-custody statements to law enforcement officials outside the presence of counsel, where there has been a voluntary relinquishment by a defendant of his right to have his counsel present. *See Government of Canal Zone v. Sierra*, 594 F.2d 60 (5th Cir.1980). Further-

[22] R.Vol. 2 at 70–72.

more, our independent examination of the record leads us to the conclusion that there is ample evidence to support the district court's findings that such conversations were initiated by the petitioner and that petitioner voluntarily waived his right to silence and his right to counsel prior to each discussion.

VII. THE PROSECUTOR'S CLOSING ARGUMENT

As we must grant relief and remand these proceedings for another sentencing trial, the specific contentions of Davis as to the impropriety of the prosecutor's statements during closing argument at petitioner's 1977 resentencing trial are moot and need not be addressed in detail here. However, as guidance with regard to permissible and impermissible prosecutorial conduct, we suggest that prosecutors read the recent decisions of this Court, including but not limited to, *Hance v. Zant*, 696 F.2d 940, 951-52 (11th Cir.1983) and *Brooks v. Francis*, 716 F.2d 780, at 787-788 (11th Cir.1983).

VIII. USE OF PETITIONER'S PRIOR CONVICTIONS

[11] Petitioner asserts that his numerous prior felony convictions obtained in Georgia county courts were improperly introduced against him as aggravating circumstances during his 1977 resentencing trial. A reading of the record quickly demonstrates that such contentions are wholly without merit.

Specifically, petitioner claims that the prior convictions were inadmissible in that they were entered into without the assistance of counsel. The district court considered this allegation and correctly concluded that such a claim hardly deserves attention, for petitioner, though given ample opportunity at the state court level, failed to pro-

duce one shred of evidence in support of his claim. Petitioner's claims that the introduction of the noncapital convictions and the length of the sentences were improper under Georgia law were likewise properly rejected by the district court, for the introduction of these factors into evidence in sentencing trials has been specifically approved by the Georgia Supreme Court. *See Davis v. State*, 241 Ga. at 383-84, 247 S.E.2d at 52-53 (1978).

IX. PROCEEDING TO DISQUALIFY THE TRIAL JUDGE

[12] Petitioner alleges that the proceeding to determine whether the 1977 sentencing trial judge should have been disqualified was improper and that the presiding judge at the sentencing trial was biased against the petitioner. However, the district court is correct in noting that such allegations were not substantiated at either the state court or at the federal district court level.[23] Such general allegations can hardly support the granting of federal habeas corpus relief.

CONCLUSION

Finding that petitioner was sentenced in 1977 before an unconstitutionally composed jury, the district court's dismissal of the petition for writ of habeas corpus is REVERSED and this claim is REMANDED for the granting of appropriate relief. Petitioner is entitled to a new sentencing proceeding before a jury properly empaneled.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion except as to Part III. I respectfully dissent from Part III, for I conclude that

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[23] *See* R.Vol. 1 at 214.

the trial court's instruction on malice unconstitutionally shifted the burden of proof to petitioner.

In determining whether a particular jury instruction shifted the burden of proof to the defendant, an appellate court must examine "the words actually spoken to the jury" to determine "the way in which a reasonable jury could have interpreted the instruction." *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979). Thus where a reasonable juror could have read the charge as creating a mandatory presumption and could have given the presumption conclusive or persuasion-shifting effect, the court must proceed on the assumption that the appellant's jurors did just that. *Id.* at 519, 99 S.Ct. at 2456.

The first question in this case, then, is whether the trial court's malice instruction could have been interpreted by a reasonable juror as shifting the burden of proof to petitioner. Our decision in *Lamb v. Jernigan*, 683 F.2d 1332 (11th Cir.1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983), answers this question. There the trial court's charge stated that "the law presumes that every homicide is malicious until the contrary appears from circumstances of alleviation, excuse or justification, and it is incumbant [sic] upon the accused to make out such circumstances to your satisfaction unless they appear from the evidence produced against him." The language at issue here is almost identical: "[t]he law presumes it to be malice until the contrary appears from circumstances of alleviation or excuse, or justification and under the laws, it is incumbent upon the Defendant to make out such circumstances satisfactory to the Jury unless they appear from the evidence offered against the Defendant." As in *Lamb*, I "cannot escape the conclusion that the

above instruction, by itself, could have been read as shifting the burden of proof to the defendant on an essential element of the crime of murder." *Id.* at 1341.

I disagree with the majority's assertion that the potential for a burden-shifting interpretation was neutralized by the trial court's subsequent instruction that "while it is true that the law presumes malice when a homicide has been shown, yet that presumption of malice may be rebutted by the Defendant from evidence offered by him, or from evidence offered by the State, or from both." This s a by no means eliminated the danger of an impermissible interpretation; rather, in reiterating that the defendant had to meet the burden of disproving malice by rebutting the presumption thereof, it exacerbated the problem identified in *Lamb*. The "curative" language "or from evidence offered by the State, or from both" merely indicated that the defendant could point to evidence adduced by the state in meeting his burden, that is, he did not have to introduce evidence of his own. In any case, the defendant still bore the risk of non-persuasion.

In my judgment, neither the language relied upon by the majority, nor the other instructions at trial distinguish this case from *Lamb* and "rule out the substantial possibility that the jury interpreted the charge as relieving the state of its constitutional burden of proving malice beyond a reasonable doubt. 'Accordingly, [petitioner's] conviction and sentence must be set aside unless the erroneous charge was harmless beyond a reasonable doubt.' " *Lamb*, 683 F.2d at 1341 (quoting *Mason v. Balkcom*, 669 F.2d 222, 226 (5th Cir.1982)). Insofar as petitioner was tried on a theory of malice murder, not felony murder, the issue of malice was critical to the jury's determination of guilt. Given that the evidence of peti-

tioner's participation in the actual killing—primarily his statements admitting presence, with others, when the killing occurred—was not overwhelming, I conclude that the instruction in question was not harmless beyond a reasonable doubt. *See Connecticut v. Johnson*, ___ U.S. ___, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983). For these reasons, I would vacate petitioner's conviction and sentence.

APPENDIX C

Curfew DAVIS, Petitioner-Appellant,

v.

Ralph KEMP, Warden, Georgia Diagnostic and Classification Center, Respondent-Appellee.

No. 83-8244.

United States Court of Appeals, Eleventh Circuit.

Jan. 24, 1985.

Petitioner, who was convicted of murder in Georgia state court and sentenced to death, appealed from an order of the United States District Court for the Northern District of Georgia, G. Ernest Tidwell, J., which denied his petition for writ of habeas corpus. On rehearing of panel opinion, 721 F.2d 1478, the Court of Appeals held that: (1) trial court's error in instructing jury during culpability phase of capital murder trial that malice and intent could be presumed without specifying the quantum law of evidence by which defendant could rebut presumption, thus shifting burden of proof to defendant, was harmless in view of overwhelming evidence that whoever killed victim did so with intent and malice and in light of fact that, although there was no explicit concession of intent and malice, main thrust of defense was noninvolvement in crime, but (2) petitioner's demonstration that he was sentenced in 1977 before an unconstitutionally composed jury warranted remand with instructions to conduct another sentencing trial.

Reversed and remanded.

James C. Hill, Circuit Judge, filed specially concurring opinion in which Fay, Circuit Judge, joined.

Fay, Circuit Judge, filed specially concurring opinion in which Roney, James C. Hill, and Albert J. Henderson, Circuit Judges, joined.

Johnson, Circuit Judge, dissented in part and filed an opinion in which Godbold, Chief Judge, Kravitch, Hatchett, and Clark, Circuit Judges joined.

Criminal Law 1172.2

Trial court's error in instructing jury during culpability phase of capital murder trial that malice and intent could be presumed without specifying the quantum law of evidence by which defendant could rebut presumption, thus shifting burden of proof to defendant, was harmless in view of overwhelming evidence that whoever killed victim did so with intent and malice and in light of fact that, although there was no explicit concession of intent and malice, main thrust of defense was noninvolvement in crime.

Joseph M. Nursey, Atlanta, Ga., Kenneth J. Rose, Kenner, La., for petitioner-appellant.

Susan V. Boleyn, William B. Hill, Jr., Mary Beth Westmoreland, Asst. Attys. Gen., Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:*

In 1974, Petitioner Curfew Davis was convicted of murder in Georgia state court and sentenced to death. After an unsuccessful attempt to obtain a writ of habeas corpus in state court, Davis filed this petition for a writ of habeas corpus under 28 U.S.C.A. § 2254 (1976). The district court dismissed the petition without holding an evidentiary hearing. A panel of this court reversed on the ground that petitioner had been sentenced in 1977 before an unconstitutionally composed jury, and remanded for another sentencing proceeding, 721 F.2d 1478 (11 Cir., 1983). We granted the parties' petition for rehearing *en banc*. The court now reinstates those sections of the panel opinion in this case which address jury composition (Section I), application of aggravating circumstance "outrageously or wantonly vile, horrible or inhuman" (Section IV), effective assistance of counsel (Section V), petitioner's statements to police during in-custody interrogation (Section VI), and use of petitioner's prior convictions (Section VIII). Because we agree with the disposition made by the panel opinion (Section I) as to the 1977 sentencing jury, we grant relief and remand the case to the district court with instructions to require yet another sentencing trial.

I. PROCEDURAL HISTORY

Based on a series of events which occurred in and around LaGrange, Georgia, on July 19, 1974.[1] Curfew

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*Concurring in Sections IIA and B of this Per Curiam opinion are: Chief Judge Godbold, Judges Vance, Kravitch, Johnson, Hatchett, Anderson and Clark.

Concurring in Section IIC of this Per Curiam opinion are: Judges Roney, Tjoflat, Hill, Fay, Vance, Henderson and Anderson.

[1] The historical facts are set out in detail in *Davis v. State*, 236 Ga. 804, 225 S.E.2d 241 (1976).

Davis, a black male, was charged in the Troup County Superior Court with first-degree murder. The victim was a young white woman who had been temporarily in LaGrange on a work assignment. The trial jury found Davis guilty of the murder charge and, under the Georgia bifurcated trial procedure, recommended that he be sentenced to death. The trial judge entered findings and imposed the death sentence.

Davis appealed to the Supreme Court of Georgia, which affirmed the convictions and the sentence. *Davis v. State*, 236 Ga. 804, 225 S.E.2d 241 (1976). The United States Supreme Court granted certiorari, vacated the death sentence for a violation of the *Witherspoon* standards as to one prospective venire person, and remanded for a new sentencing proceeding. *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976).

After the resentencing proceedings in June 1977 Petitioner was once again sentenced to death. The Supreme Court of Georgia affirmed, *Davis v. State*, 241 Ga. 376, 247 S.E.2d 45 (1978), and the United States Supreme Court denied certiorari. *Davis v. Georgia*, 439 U.S. 947, 99 S.Ct. 341, 58 L.Ed.2d 338 (1978).

Davis then brought a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. This petition was denied in April 1981. The Georgia Supreme Court denied an application for certificate of probable cause to appeal the judgment of the Superior Court, and the United States Supreme Court denied certiorari. *Davis v. Zant*, 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed.2d 692 (1982).

Davis then filed the present petition for writ of habeas corpus in the United States District Court for the Northern District of Georgia. He subsequently filed a motion

for an evidentiary hearing. The district court denied both the motion and the petition. A panel of this court reversed, citing the unconstitutional composition of the 1977 sentencing jury, and remanded for a new sentencing trial. This Court granted the petition of both parties for rehearing *en banc*.

The habeas petition now before us raises issues with respect to petitioner's 1974 trial and his 1977 resentencing trial.

II. THE *SANDSTROM* CLAIM

Petitioner claims that, during the 1974 culpability phase of his trial, the trial court's instructions to the jury on the elements of intent and malice violated his rights under *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). In that case the Court held that the judge's instructions deprived the defendant of due process because they were susceptible of an interpretation which removed from the prosecution the burden of proving every element of the crime beyond a reasonable doubt. To determine whether the judge's instructions in this case thus infringed the constitutional rights of the petitioner, we must consider first, whether the instructions concerned an essential element of the offense with which the petitioner was charged; second, whether the instructions operated to shift the burden of proof; and third, whether any error which might have arisen from the shifting of the burden was harmless in the context of this case. *Lamb v. Jernigan*, 683 F.2d 1332, 1336-42 (11th Cir. 1982), *cert. denied*, 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983).

Neither party contests the finding of the district court that under Georgia law, the elements of malice and intent

to kill are essential elements of the crime of murder, which the state is required to prove beyond a reasonable doubt. *See also Franklin v. Francis*, 720 F.2d 1206, 1210 (11th Cir.1983), *cert. granted*, ____ U.S. ____, 104 S.Ct. 2677, 81 L.Ed.2d 873 (1984); *Lamb v. Jernigan*, *supra*, 683 F.2d at 1336-37. The state argues, however, that both instructions contained sufficient clarifying language to dispel any impression that they relieved the prosecution of its burden of proof.

A. Intent

The trial court gave the jury the following instruction with respect to the element of intent:

> Ladies and gentlemen, a crime is a violation of a statute of this state in which there shall be an [sic] union of joint operation of acts or an omission to act, and an intention for criminal negligence. The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but the presumption may be rebutted. A person will not be presumed to act with criminal intention, but the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted. Every person is presumed to be of sound mind and discretion, but the presumption may be rebutted.

The state argues first that the frequent repetition of the warning that the relevant presumptions "may be rebutted" renders the instruction as a whole sufficiently "permissive" to "pass muster" under *Sandstrom*. This argument misunderstands both the Court's opinion in *Sandstrom* and the application of that opinion to more recent cases by this court.

The Court held in *Sandstrom* that the language "the law presumes" was susceptible to interpretation as a mandatory presumption. Though this presumption could be regarded by the jury as rebuttable,[2] it was nonetheless unconstitutional, as it shifted the burden of proof to the defendant without specifying the quantum of evidence by which he could rebut the presumption. So long as the jury could conclude that the defendant was required to produce more than "some" evidence in order to rebut the presumption, the instruction impermissibly shifted the burden of proof. *Sandstrom v. Montana*, 442 U.S. at 517, 524, 99 S.Ct. at 2459.

The same rationale was applied by this Court in *Franklin v. Francis*, *supra*, to an instruction which was virtually identical to the one given in the instant case. In *Franklin*, this court observed that "the problem with the charge on intent here is that the jury was never enlightened as to the nature of the burden of Franklin to rebut the presumption that he intended the killing." 720 F.2d at 1211. Because the jury could have concluded that Franklin "had to produce more than some evidence that he did not intend to kill," *id.*, the instruction shifted the burden impermissibly to the defendant.[3] The instant instruction

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[2] The Court held that the presumption might be interpreted as irrebuttable, or conclusive, or as rebuttable, 442 U.S. at 516–517, 99 S.Ct. at 2455–56, but because it did not, in either case, exclude the perception on the part of the jury that the defendant would be required to offer more than "some" evidence in order to rebut the presumption, it shifted the burden of proof in violation of the Constitution.

[3] We reject the argument offered by the state that this Court's opinion in *Lamb v. Jernigan*, *supra*, should control with respect to the intent instruction. Notwithstanding the state claims of similarity, there are differences of constitutional stature between the language of the instruction in that case and the language used here. Most notable is the use, in the *Lamb* instruction, of the language "intent *may be* presumed" (emphasis added). This language, which

falls clearly under the rule established by *Sandstrom* and applied in *Franklin*. As it imposes a mandatory ("a person is presumed . . ."), rebuttable ("but this presumption may be rebutted") presumption, and fails to specify the quantum of proof by which the defendant may rebut that presumption, it possesses the same constitutional defect as the charges' found constitutionally defective in *Sandstrom* and *Franklin*.

The state argues next that the portion of the instruction stating that "a person will not be presumed to act with criminal intention" significantly reduces the likelihood that a jury could misinterpret the instruction. This claim has also been soundly rejected in recent cases decided by this Court.

The question was presented this year in *Patterson v. Austin*, 728 F.2d 1389 (11th Cir.1984), by an instruction which included both the presumptions challenged by Davis and the instruction offered here as curative by the State. With respect to that charge, this court explained:

> Neither did the instruction that criminal intent should not be presumed eliminate the vice *Sandstrom* condemns. This instruction at best conflicted with the challenged presumption; it did not explain it. At worst, the jury could have made the instructions consistent, interpreting the burden to be on the defendant to rebut the presumption that he intended to kill [the victim], and on the State to show that the killing itself was criminal. Even if the jury believed that the two presumptions conflicted, it would be impossible for us to tell which one they decided to apply, or whether they applied something in between.

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clearly signals a permissive presumption, is distinguishable from a mandatory directive ("the law presumes", "a person is presumed"), such as the one employed in this case. The court in *Lamb*, moreover, relied on this distinction in upholding the instruction in that case. 683 F.2d at 1340.

728 F.2d at 1394. *See also Franklin v. Francis*, 720 F.2d at 1212 (same conclusion). The court concluded in both *Patterson* and *Franklin* that the challenged instruction unconstitutionally shifted the burden of proof. The same is true of the instant instruction, whose criminal intent provision is more likely to enhance than to correct the jury's confusion.

The state's third argument, that any error was cured by the court's instruction that the prosecution has the burden of proving every element of a crime beyond a reasonable doubt, is also without merit. This claim was rejected by the Supreme Court in *Sandstrom*, which held that a general instruction that the prosecution is required to prove each element beyond a reasonable doubt is not "rhetorically inconsistent" with a burden-shifting presumption. 442 U.S. 518-19, n. 7, 99 S.Ct. at 2456-57, n. 7. The general instruction could have been interpreted to suggest, for example, that the presumption was one means by which the prosecution's burden of proof could be satisfied. *Id. See also Patterson v. Austin, supra*, 728 F.2d at 1394; *Franklin v. Francis, supra*, 720 F.2d at 1211-12. The instant instruction, which is identical to the general instruction concerning the burden of proof in the cases cited above, is susceptible to the same interpretation; thus it impermissibly shifts the burden of proof to the defendant.

B. Malice

The trial court's instruction to the jury on the element of malice reads as follows:

> There can be no murder under the laws of this State without malice, either express or implied. The law presumes it to be malice until the contrary appears from the circumstances of alleviation or excuse or justification, and under the laws it is incumbent upon the de-

> fendant to make out such circumstances satisfactory to the jury, unless they appear from the evidence offered against the defendant.
>
> Ladies and gentlemen, while it is true that the law presumes malice when a homicide has been shown, yet that presumption of malice may be rebutted by the defendant from evidence offered by him or from evidence offered by the state or from both.

The state argues first that the curative language "or from evidence offered by the state or from both" eliminates any possibility that the instruction may be interpreted as shifting burden of proof on the element of malice. But this language, does not refute the inference that the defendant carries the burden of proof with respect to this element; if anything, it tends to reinforce that inference. What it specifies are the categories of evidence with which the defendant may satisfy that burden: with "evidence offered by him or . . . by the state or from both." The fact that the defendant may have larger pool of evidence on which to draw in order to prove his innocence does not negate the conclusion suggested by the very unequivocal language "the law presumes" that the burden is on the defendant to demonstrate an absence of malice once a homicide has been shown.[4]

The state argues next that the instruction that "the presumption may be rebutted" is sufficient to cure any

[4] Similar language contained in the malice instruction in *Lamb v. Jernigan*, *supra*, did not, moreover, prevent that instruction from being struck down as unconstitutionally burden-shifting. *Lamb* instruction said that the defendant need not demonstrate circumstances rebutting the presumption where such circumstances "appear from the evidence produced against him." If this instruction, which is even more explicit in relieving the defendant of the burden of proof under certain circumstances, was insufficient to "pass muster" under *Sandstrom* then the instruction given in the instant case is insufficiently curative.

error engendered by the mandatory language preceding it. In support of this proposition, appellee cites this court's opinion in *Corn v. Zant*, 708 F.2d 549 (11th Cir.1983), which upheld as constitutional an instruction which contained both the mandatory presumption and the statement that the presumption may be rebutted. This claim is subject to the same infirmity as the analogous argument raised with respect intent: *Sandstrom* is concerned with whether the presumption is mandatory, not whether it is rebuttable. Once the jury is instructed that "the law presumes" malice, the burden has been unconstitutionally shifted, unless the instruction specifies the precise quantum of evidence by which the defendant can refute the presumption against him. The state's reliance on *Corn* is, moreover, misplaced. The curative instructions contained in that charge included not only the general instruction on rebuttability, but several instructions which suggested that the presumption concerning malice was permissive rather than mandatory.[5] Because the instruction in this

[5] The instruction in *Corn* also noted that the accused "may" show circumstances to negate intent, "but he is not required to do so"; that he "may" show that the killing was done without malice, "but he is not required to do so"; that "if such evidence produced against the accused, if there be such, discloses that the homicide was done without malice, then this presumption that homicide is malicious does not exist"; and that "this presumption . . . does not arise against the slayer unless it be first shown to a moral and reasonable certainty and beyond a reasonable doubt the defendant was the intentional slayer."

Despite the more potent curative instructions included in that charge, it appears that the court in *Corn* upheld the instruction by applying a standard which was different than that developed in *Sandstrom* and employed in the later cases decided by the Court. The Court in *Sandstrom* held that whether the defendant's right had been infringed depended on how a reasonable juror "could have interpreted the instruction." 442 U.S. at 514, 515, 517, 519, 524, 99 S.Ct. at 2454, 2455, 2456, 2459. The Court held it to be irrelevant that a juror could have drawn a permissible inference, if the instruction also allowed a juror to draw an impermissible inference. *Id.* at

case contains none of these additional instructions, it is closer to the instruction given in *Franklin v. Francis*, *supra*, than to that upheld in *Corn*. The instruction in *Franklin*, which contained arguably stronger curative language than that included in the instant instruction,[4] was struck down because it failed to specify the quantum of evidence by which the defendant was required to refute the presumption against him. 720 F.2d at 1211. The instruction in the instant case, which is possessed of the same defect, requires a similar fate.

Nor is the instruction saved by the state's final argument, that the general instruction regarding the prosecutor's burden cured any error. This claim is no more effective with respect to malice than it is with respect to intent. *See supra*, at 2022-2023. Because the two presump-

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519, 99 S.Ct. at 2456. The Court in *Corn* begins by articulating this standard, 708 F.2d at 558, but inexplicably declines to apply it. The *Corn* panel reached its conclusion based on what *it believes* a reasonable juror *would* do, or did in fact do, *id.* at 559, 560; it does not ask that a reasonable juror *could* have concluded, given the language of the instruction. This analysis also departs from this Court's opinions in *Lamb v. Jernigan*, 683 F.2d at 1338–40, *Franklin v. Francis*, 720 F.2d 1210–12, and *Patterson v. Austin*, 728 F.2d at 1394, which applied the *Sandstrom* standard. *Corn* also appears to be the only case in this Circuit to suggest that an impermissible instruction may be cured simply by the inclusion of a statement that the presumption created by the instruction is rebuttable. 708 F.2d at 559.

[4] The *Franklin* instruction states: "It is not encumbent [sic] upon the accused to prove an absence of malice if the evidence for the prosecution shows facts which may excuse or justify the homicide. The accused is not required to produce evidence of mitigation, justification or excuse on his part to the crime of murder. Whether mitigation, justification or excuse is shown by the evidence on the part of the state, it is not required of the accused to prove an absence of malice if the evidence for the State showed facts which may excuse or justify the homicide." 720 F.2d at 1209. This curative instruction, which is ambiguous as to whether the defendant is obliged to make a showing of extenuation when this showing has *not* been made by the State, seems weaker than the curative instruction given in *Corn* and stronger than that given in the instant case.

tions are not necessarily inconsistent, a reasonable juror could still have concluded that the instruction shifted the burden of proof to the defendant. *Sandstrom, supra,* 442 U.S. at 518-19 n. 17, 99 S.Ct. at 2456-57, n. 17. Thus none of the ameliorative instructions offered by the state cures the unconstitutional shifting of the burden of proof effected by the mandatory presumptions concerning intent and malice; it only remains to be seen whether the error implicit in this shifting of the burden was harmless.

C. Harmless Error

In *Connecticut v. Johnson,* 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983), four members of the Court suggested that the harmless error doctrine may be *per se* inapplicable to a *Sandstrom* error; this absolute rule was not, however, adopted by a majority of the Court. Therefore, under the existing precedent, harmless error can be invoked with regard to a *Sandstrom* violation.[7] *See also Lamb v. Jernigan,* 683 F.2d 1332 (11th Cir.1982), *cert. denied,* 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983).

This court has identified two situations in which harmless error in the case of a *Sandstrom* violation can be invoked: if the evidence was overwhelming as to the defendant's guilt [8] and if the instruction was applied to an

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[7] The harmless error doctrine stems from *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The inquiry made is whether a court may say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.,* at 24, 87 S.Ct. at 828.

[8] Numerous courts have applied harmless error when the evidence of the guilt of the defendant was overwhelming. *See e.g., United States v. Fricke,* 684 F.2d 1126, 1129 (5th Cir.1982); *Tweety v. Mitchell,* 682 F.2d 461, 465 (4th Cir. 1982).

element of the crime which was not at issue at the trial.[9] *Lamb*, 683 F.2d at 1342. *See also Drake v. Francis*, 727 F.2d 990, 999 (11th Cir.1984); *Spencer v. Zant*, 715 F.2d 1562, 1577-78 (11th Cir.1983). The defendant in this case gave a number of inconsistent versions as to his involvement in the murder. Though inconsistent, the predominant theme in all of them was that he had nothing whatsoever to do with the crime. *See Davis v. State*, 236 Ga. 804, 804-08, 225 S.E.2d 241, 242-43 (1976). Although there was no explicit concession of intent and malice, the main thrust of the defense was non-involvement.

The evidence in this case is overwhelming[10] that whoever killed the victim did so with intent and malice. The victim died of a .22 caliber pistol bullet in her brain; she also suffered severe fractures to her face and jaw bones, and her clothing had been torn into strips and tied together as if they had been used as bonds to tie her. *Davis v. State*, supra. Under these circumstances, it is readily understandable why lack of intent was not affirmatively pursued. While the burden of proof with respect to intent

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[9] Other courts have held that if a criminal defendant's intent is not a disputed issue at trial, then harmless error may be invoked. *See, e.g., Conway v. Anderson*, 698 F.2d 282, 285 (6th Cir.1983); *Petition of Hamilton*, 721 F.2d 1189 (9th Cir.1983); *United States v. Winter*, 663 F.2d 1120, 1144–45 (1st Cir.1981). *Cf. Redding v. Benson*, 739 F.2d 1360, 1364–65 (8th Cir.1984) (failure to properly instruct on a material element of a crime does not warrant automatic reversal).

[10] Although some opinions talk in terms of overwhelming evidence of *guilt*, (which will obviously always include the necessity of overwhelming evidence of intent), the analysis in the text makes it clear that the crucial inquiry relates to whether or not there is overwhelming evidence of intent. See *Connecticut v. Johnson*, 460 U.S. at 86, 103 S.Ct. at 977 (Blackmun, J.) and at 90, 96, 97, 99, 101, 103 S.Ct. at 979, 982, 983, 984, 985 (Powell, J.). The jury in this case concluded that Davis was the killer, and that conclusion could not have been affected by the erroneous instruction. Thus overwhelming evidence that Davis was the killer is not required.

and malice remained on the state, it was not a contested issue nor an alternative defense.

As stated by the Sixth Circuit in a recent opinion, *Engle v. Koehler*, 707 F.2d 241, 246 (6th Cir.1983), *aff'd by an equally divided court*, ___ U.S. ___, 104 S.Ct. 1673, 80 L.Ed.2d 1 (1984) (per curiam), "the prejudicial effect of a *Sandstrom* instruction is largely a function of the defense asserted at trial." That Court of Appeals had divided *Sandstrom* violations into two categories: those which occur when the defendant claims non-participation in the crime and those when the defendant claims lack of *mens rea*. *Id.* In the first category the doctrine of harmless error may be found applicable. *Id.* The defense presented by Davis was non-participation. The intent of the person or persons committing the crime was not a contested issue. Under these circumstances, the doctrine of harmless error is most appropriate.

CONCLUSION

Although we find a *Sandstrom* violation in the charge given to the 1974 jury (culpability proceedings), we hold it is harmless error under the particular circumstances of this case.

REVERSED and **REMANDED** for appropriate relief in accordance with those sections of the panel opinion which have now been reinstated.

HILL, Circuit Judge, specially concurring, in which FAY, Circuit Judge, joins:

I concur in the judgment.

I concur in the special concurrence authorized by Judge Fay and add these words.

In submitting this death penalty to the microscopic, and critical, examination currently practiced, the Supreme Court's reasoned opinion in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) has been distorted to an unreasonable result.

Sandstrom is a narrow holding resolving a case unlike the one now before us. The trial judge in *Sandstrom* instructed the jury in these exact words:

> The law presumes that a person intends the ordinary consequences of his voluntary acts.

He made no further reference to the subject.[1] Although the instruction was probably designed to state that which Judge Fay correctly observes to be ". . . totally in accord with human behavior," it inadvertently intruded into a critical area. Criminal intent was, in that case (as it is in this one), an element of the crime. The burden of proving it was on the state. Unless the instruction were restricted (which it was not), it could be construed as providing a presumption by which the state's burden could be carried without proof.

The trial judge in the case we are reviewing did not so instruct the jury. Lest its members be led to believe that the presumption, "totally in accord with human behavior" in general, be extended to proof of a necessary element of the crime, he told the jurors, specifically and clearly,

> A person will *not* be presumed to act with criminal intention . . ." (emphasis added).

[1] An appendix to the petition for Writ of Certiorari filed in the office of the Clerk of the Supreme Court set out the instructions given by Judge Boyd in the trial of Mr. Sandstrom, as well as the colloquy between the court and petitioner's attorney with respect to the instruction at issue in that case. The instructions and the colloquy are set out in an appendix to this dissent.

Perhaps I am not sufficiently sophisticated to find that a trial judge authorized a jury to presume criminal intent in an instruction which says that criminal intention will not be presumed, but I suggest that sophistry is no great virtue in our work.

APPENDIX [2]

Petition for Writ of Certiorari

Filed in Supreme Court Clerk's office, September 12, 1978 by Counsel for Petitioner David Sandstrom.

THE COLLOQUY BETWEEN THE COURT AND PETITIONER'S ATTORNEY WITH RESPECT TO THE INSTRUCTION HERE AT ISSUE.

[Official Transcript pages 332 line 12 through 333 line 6]

THE COURT: The Court proposes to give Instruction No. 5, offered by the State as No. 3.

MR. BOGGS: Your Honor, I object to that instruction. I can cite to your Honor a number of cases, I believe they are all in the Federal Court or—I believe in the Federal Court, one in the 9th Circuit Court of Appeals that have disproved the use of this instruction. The holding has been that the instruction has the effect of shifting the burden of proof on the issue of intent to the defense and that is impermissible under the Federal Constitution, due process of law. Stating from the case of *Mullaney vs. Wilbur* the United States Supreme Court case, the 5th Circuit has categorically denounced and the 9th Circuit—and it was not reversible but nonetheless it was an error to use the instruction.

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[2] These materials may be found at Appendix to Petition for Certiorari 34–37, *Sandstrom v. Montana*, No. 78–5384 (C.I.S. Microfische, Supreme Court Records and Briefs F.O. 78).

APPENDIX—Continued

My intern can give you those citations if you would like to see them.

THE COURT: You can given those to the Supreme Court. The objection is overruled.

INSTRUCTIONS GIVEN BY JUDGE BOYD

INSTRUCTION NO. 3

The defendant, David Sandstrom, is by information charged with the crime of deliberate homicide, a felony, in that on or about November 1, 1976, in Deer Lodge County, Montana, he purposely or knowingly caused the death of Annie Jessen by stabbing the said Annie Jessen in the back with a knife.

Before you may convict the defendant, David Sandstrom of the crime of deliberate homicide, a felony, you must be convinced beyond a reasonable doubt of the following elements of this crime:

1) That the defendant did cause the death of Annie Jessen on November 1, 1976, in Deer Lodge County, Montana; and

2) That the defendant caused the death of Annie Jessen purposely or knowingly.

INSTRUCTION NO. 4

You are instructed the law presumes a person innocent until he is proved guilty, and this proof must be of a nature to satisfy your minds beyond a reasonable doubt of the guilt of the accused. The mere fact that an information has been filed, charging a person with a crime, does not in itself, raise a presumption of guilt.

The presumption of innocence has the weight and effect of evidence in the Defendant's behalf, and this should

APPENDIX—Continued

continue until it is rebutted by competent evidence which displaces any resonable doubt you might otherwise have of the Defendant's guilt.

INSTRUCTION NO. 5

The law presumes that a person intends the ordinary consequences of his voluntary acts.

INSTRUCTION NO. 6

A Material element of every crime is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing.

INSTRUCTION NO. 7

"Knowingly" is defined as follows: A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstances exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowingly" or "with knowledge" have the same meaning.

INSTRUCTION NO. 8

"Purposely" is defined as follows: A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result.

APPENDIX – Continued

INSTRUCTION NO. 9

Purpose and knowledge are manifested by the circumstances connected with the offense. Purposes and knowledge need not be proved by direct evidence, but may be inferred from acts, conduct and circumstances appearing in evidence.

INSTRUCTION NO. 10

A person who is in an intoxicated condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. An intoxicated condition may be taken into consideration in determining the existence of a mental state which is an element of the offense.

INSTRUCTION NO. 11

"Mitigated deliberate homicide" is defined as follows: Criminal homicide constitutes mitigated deliberate homicide when a homicide which would otherwise be deliberate homicide is committed under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the actor's situation.

INSTRUCTION NO. 12

You are instructed that the defendant, David Sandstrom, has abandoned the defense of mental disease or defect and you may not acquit the defendant on that basis.

APPENDIX—Continued

INSTRUCTION NO. 13

If you are convinced beyond a reasonable doubt that the defendant, David Sandstrom, caused the death of Annie Jessen on November 1, 1976, in Deer Lodge County, Montana, but you are not convinced beyond a reasonable doubt that the defendant caused the death of Annie Jessen purposely or knowingly, then you should find the defendant guilty of mitigated deliberate homicide.

INSTRUCTION NO. 14

If you are not convinced beyond a reasonable doubt that the defendant, David Sandstrom, caused the death of Annie Jessen on November 1, 1976, in Deer Lodge County, Montana, purposely or knowingly, then you should find the defendant not guilty of deliberate homicide.

INSTRUCTION NO. 15

You are to draw no conclusions or inferences from the fact that the defendant has not testified in this case, and you are entitled to draw no conclusions or inferences as to his reason in that regard.

FAY, Circuit Judge, specially concurring, in which RONEY, HILL and HENDERSON, Circuit Judges, join:

While concurring in the judgment and most of the opinion of the court, I dissent from the position taken by the majority in sections IIA and B of The Sandstrom Claim. The jury charge given by the trial judge is set forth in its entirety in the margin.[1] As Justice Rehnquist

[1] Appellant's Complete Jury Charge as contained in the transcript of the first trial, pp. 174–180.

THE COURT'S ORAL CHARGE

The State accuses and charges Curfew Davis, who must be iden-

pointed out in his special concurrence in *Sandstrom:*

> [W]e have consistently recognized, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-147 [94 S.Ct. 396, 400-401, 38 L.Ed.2d 368] (1973). And surely

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Note 1—Continued

tified as the Defendant on trial, with the offense of murder, for that the said Curfew Davis, on the 19th day of July in the year of 1974, in Troup County, Georgia, did then and there unlawfully, and with malice aforethought, killed one Ann Starnes, a human being, by shooting the said Ann Starnes with a certain pistol, contrary to the laws of said state, the good order, peace and dignity thereof.

Now, what I have done, Ladies and Gentlemen of the Jury, I have read to you the material allegations of the State's bill of indictment against the Defendant on trial. To this indictment, the Defendant has entered his plea of not guilty, which along with the indictment of the State, from the issues which are to be resolved in this case.

I charge you, Ladies and Gentlemen, this indictment by the State will be out with you during your deliberation, but I caution you, that it is not evidence and should not be regarded as evidence by you. While the indictment of the State is not evidence and has no probative value, it may and should be referred to by you for the purpose of ascertaining in detail the charges against the Defendant on trial.

Ladies and Gentlemen, a crime is a violation of a statute of this State in which there shall be a union of joint operation of acts, or an omission to act, and an intention for criminal negligence. The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but the presumption may be rebutted. A person will not be presumed to act with criminal intention, but the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted. Every person is presumed to be of sound mind and discretion, but the presumption may be rebutted.

I charge you, every person concerned in the commission of a crime is a party thereto, and may be charged with and convicted

if this charge had, in the words of the Court, "merely described a permissive inference," *ante*, at 514, it could not conceivably have run afoul of the constitutional decisions cited by the Court in its opinion.

442 U.S. at 527, 99 S.Ct. at 2461.

Note 1—Continued

of commission of a crime. A person is concerned in the commission of a crime only if he:

(1) Deliberately commits the crime; or (2) intentionally causes some other person who commits the crime, under certain circumstances that the other person is not guilty of any crime, either in fact or because of legal capacity; or (3) intentionally aids or abets in the commission of a crime; or (4) intentionally advises and encourages, hires, counsels or procures another to commit the crime.

Now Ladies and Gentlemen of the Jury, a person commits murder when he unlawfully and with malice aforethought, either expressed or implied, causes the death of another human being. Expressed malice is the deliberate intention unlawfully to take the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all of the circumstances of the killing show an abandoned and malignant heart. A person also commits the crime of murder when in the commission of a felony causes the death of another human being, irrespective of malice.

I charge you, a person convicted of murder shall be punished by death or by imprisonment for life. But, in this connection, Ladies and Gentlemen, at this stage of the trial, I charge you that you are not to be concerned with the punishment of the Defendant at this stage, only as to his guilt or innocence.

Now, Ladies and Gentlemen of the Jury, I charge you that the Defendant enters upon the trial of his case with the presumption of innocence in his favor, and this presumption remains with him, until and unless, the State shall overcome it and remove it by the introduction of competent evidence in your presence and hearing, sufficient to convince your minds beyond a reasonable doubt of the guilt of the accused.

In this connection, Ladies and Gentlemen, I charge you that it is the duty of the State to prove each and every one of the material allegations in the indictment, and the guilt of the Defendant, sufficient to convince your minds beyond a reasonable doubt of the guilt of the accused.

APPENDIX – Continued

The trial judge and the attorneys made it abundantly clear to the jury on numerous occasions that the State had the burden of proving each and every element of the offense charged beyond a reasonable doubt. This was repeated in the final charge to the jury. The language dealing with the "presumption" is both short in length and

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Note 1—Continued

Ladies & Gentlemen, a reasonable doubt is a doubt for which you can give a reason, and means just what it says. It is a doubt of a fair-minded, impartial juror, honestly seeking the truth. It is not an arbitrary or a capricious doubt, but a doubt arising from a consideration of the evidence, or from a lack of the evidence, or from a conflict of evidence. Whether dependent upon positive or circumstantial evidence, the true question in criminal cases, is to know whether it would be possible at the conclusion for which the evidence may be false, but whether there is sufficient evidence to satisfy the minds and conscience beyond a reasonable doubt. If after considering all of the facts and circumstances of the case, your minds are wavering, unsettled and unsatisfied, then that is the doubt of the law and you should acquit the Defendant. But, if that doubt does not exist in your minds as to the guilt of the Defendant, then you should convict.

I further charge you, Ladies & Gentlemen of the Jury, that you are the judges of both the law and the facts in criminal cases, the law you take from the Court as given you in charge, and the fact you get from the evidence introduced, and to the one you apply the other, and then make your findings as to the truth of the case. The charge of the Court is the law of the case, and by that you are bound, except you are the judges of it in applying it to the facts as you find them to be.

Ladies & Gentlemen, you are made by the law the exclusive judges of the credibility of the witnesses. In passing upon their credibility, you may consider all of the facts and circumstances of the case, the witnesses manner of testifying, their relationship to the parties, if any, their intelligence or lack of intelligence, their interest in the results of the case, their bias or prejudice, if any exist, their means of knowing the facts to which they testify, the probability of their testimony, and of the occurrences to which they testified, and also, their personal credibility sofar [sic] as the same may legitimately appear upon the trial of the case. If upon the consideration of the evidence in this case, you find that there is a conflict between the witnesses, or a conflict between a witness

totally in accord with human behavior. Acts generally speak for themselves, particularly in the absence of any contrary explanation. More importantly, however, each sentence containing the presumption language concluded with the words, "but the presumption may be rebutted." Such language was not present in the charge reviewed by

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Note 1—Continued

or witnesses, if any, it is your duty to reconcile that conflict, if you can, without imputing perjury to any witness. If you cannot do that, it then becomes your duty to believe that witness or those witnesses that you think are best entitled to believe, and you may consider their interest, or want of interest, in the results of the case, their bias or prejudiced, if any appears, the reasonableness or unreasonableness of the statements they make, their familiarity with the facts to which they testified about, and their personal and the personal credibility of a witness, sofaras [sic] the same may legitimately appear upon the trial of the case. But, the Jury as stated, are at last the sole and exclusive judges of what witnesses they believe or disbelieve, and what testimony they will credit or discredit.

Ladies & Gentlemen, I charge you object [sic] of all legal investigations is the discovery of the truth. Direct evidence is that which points immediately to the question at issue. Indirect or circumstantial evidence is that which tends to establish the issue by proof of various facts and circumstances, sustained by their consistency the hypothesis claimed.

Ladies and Gentlemen, before you would be authorized to convict the Defendant on circumstantial evidence alone, the proven facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused. The term hypothesis, as used in this connection, refers to and means such reasonable inferences as are ordinarily drawn by ordinary men in the light of their experiences in every day life. The guilt of the Defendant must be proved beyond a reasonable doubt and must not rest upon conjecture or bare suspicion. Where all of the facts and circumstances of the case, and all reasonable deductions therefrom, presents two theories, one of guilt and the other of innocence, then you should acquit the Defendant.

Ladies & Gentlemen, the STATE has introduced into evidence certain alleged admissions by the Defendant, which the State con-

the Court in *Sandstrom*. *See Sandstrom*, 442 U.S. at 525 n. 12, 99 S.Ct. at 2460 n. 12. Justice Brennan emphasized that:

> "They [jury] were not told that the presumption could be rebutted, as the Montana Supreme Court held, by the defendant's simple presentation of 'some' evidence; nor even that it could be rebutted at all."

442 U.S. at 517, 99 S.Ct. at 2455.

Note 1—Continued

tends are incriminatory. I charge you, an admission as applied to criminal cases, is the avowal of a fact or circumstance by the Defendant, not amounting to a confession of guilt, but tending to prove the offense and from which guilt may be inferred. An incriminatory statement is one made by the Defendant, which tends to establish the guilt of the accused, or one from which, together with other proven facts, ifany [sic], guilt may be inferred, or one which tends to disprove some defense set up by the accused. Admissions and incriminatory statements are not direct but circumstantial evidence and should be scanned with care and received with great caution. The Jury may believe admissions or incriminatory statements in whole or in part, believing that which they find to be true, and rejecting that which they find to be untrue, unless the State relies entirely upon such admissions or statements.

Ladies and Gentlemen of the Jury, I charge you that in this state, in a criminal case, if the Defendant wishes to testify, and announces in open Court his intention to do so, he may so testify in his own behalf. If so, he shall be sworn as any other witness, and may be examined and cross-examined as any other witness. However, I charge you the failure of a Defendant to testify, shall create no presumption of guilt against him and no comment shall be made because of such failure.

Ladies and Gentlemen of the Jury, as previously charged, our law provides, that a person commits murder when he unlawfully, and with malice aforethought, either expressed or implied, causes the death of another human being. In this connection, I charge you that expressed malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all of the circumstances of the killing show an abandoned and malignant heart. There can be no murder under the laws of this state with-

APPENDIX—Continued

In my opinion, the holding of the Supreme Court in *Sandstrom* has no application to the charge given in this case. *Sandstrom* condemns any "presumption", or other charge, which would shift to the defendant the burden of

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Note 1—Continued

out malice, either expressed or implied. The law presumes it to be malice until the contrary appears from circumstances of alleviation or excuse, or justification and under the laws it is incumbent upon the Defendant to make out such circumstances satisfactory to the Jury unless they appear from the evidence offered against the Defendant.

Ladies and Gentlemen, while it is true that the law presumes malice when a homocide [sic] has been shown, yet that presumption of malice may be rebutted by the Defendant from evidence offered by him, or from evidence offered by the State or from both.

Now, Ladies and Gentlemen of the Jury, after careful consideration of all of the evidence, facts and circumstances of this case, under the rules of law that I have given you in charge, if you believe beyond a reasonable doubt that this Defendant committed the crime for which he is charged, it would be your duty to find the Defendant guilty, and the form of your verdict would be, "We, the Jury, findthe [sic] Defendant guilty." If on the other hand, after careful consideration of all of the evidence, facts and circumstances of this case, under the rules of law that I have given you in charge, you do not believe beyond a reasonable doubt that this Defendant committed the crime for which he is charged, it would then be your duty to acquit the Defendant, and the form of your verdict would be "We, the Jury findthe [sic] Defendant guilty." If on the other hand, after careful consideration of all of the evidence, facts and circumstances of this case, under the rules of law that I have given you in charge, you do not believe beyond a reasonable doubt that this defendant committed the crime for which he is charged, it would then be your duty to acquit the Defendant, and the form of your verdict would be, "We, the Jury, find the Defendant not guilty."

Whatever your verdict may be, it must be unanimous and you will write it on the back of the indictment. There is a place provided there for it, which you will have out with you, date it, and one of you sign it as foreman. And, when you have reached your verdict, you then may return it into Court.

With these instructions, Ladies and Gentlemen, you may retire to the Jury Room to consider your verdict.

disproving an element of the crime charged. The jury trying this case was instructed in clear terms that (1) criminal intent must be established by the State and (2) they should look at all the surrounding circumstances of the shooting to determine whether or not such existed. The charge said:

> "A person will not be presumed to act with criminal intention, but the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted."

Such language hardly shifts any burden of proof to the defendant.

The majority opinion finds support for its holding in our court's opinion in *Franklin v. Francis*, while at the same time criticizing, but not reversing or overruling, our court's opinion in *Corn v. Zant*. My own view is that both are inappropriate. We are considering this issue and this case as an *en banc* body. We are bound only by existing precedents of the United States Supreme Court.

In my opinion the charge given is in complete accord with *Sandstrom*.

JOHNSON, Circuit Judge, dissenting from IIC, in which GODBOLD, Chief Judge, KRAVITCH, HATCHETT and CLARK, Circuit Judges, join:

The majority holds that the court's instructions on the elements of malice and intent shifted the burden of proof in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), but finds this error harmless because petitioner raised a non-participation defense rather than arguing that he lacked *mens rea*. Be-

cause the majority's analysis is based on a false distinction among different types of defenses, and a flawed understanding of the jury's responsibility with respect to the essential elements of a crime, I dissent.

The plurality opinion of the Court in *Connecticut v. Johnson*, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983), cast serious doubt on whether the doctrine of harmless error can be applied to the shifting of a presumption which is so integral to the concept of a fair trial. While this restriction on the harmless error rule failed to garner the support of a majority, the Court affirmed the pre-existing federal requirement that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). This Circuit propounded a similar standard in *Lamb v. Jernigan*, 683 F.2d 1332, 1342 (11th Cir.1982), *cert. denied*, 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983), where it stated that error in a case of a *Sandstrom* violation can only be harmless if it applied to an element of the crime which was not at issue at the trial, or if the evidence was overwhelming as to the defendant's guilt.

The majority, however, takes its bearings primarily from *Engle v. Koehler*, 707 F.2d 241, 246 (6th Cir.1983), *aff'd by an equally divided court*, ____ U.S. ____, 104 S.Ct. 1673, 80 L.Ed.2d 1 (1984), a Sixth Circuit rendition of the harmless error doctrine which attempts to distinguish between cases in which the defendant claims non-participation in the crime and cases in which the defendant claims lack of *mens rea*. In *Engle* the court concluded that, while *Sandstrom* error in a case where a *mens rea* defense has been raised is sufficient prejudicial that error cannot be

harmless, similar error in a case in which a non-participation defense has been raised may be harmless. The majority in the instant case justifies this distinction by explaining that where a non-participation defense is presented, intent is not at issue in the trial.

The majority's analysis fails, at the outset, to recognize that *Engle* does not compel the result reached in this case. *Engle's* conclusion that a *Sandstrom* error in a case involving a non-participation defense *may be* harmless is not determinative of any particular outcome in the instant case. More importantly, neither the Sixth Circuit nor the majority provides an adequate justification for the distinction between non-participation and *mens rea* defenses. Intent is an issue which must be addressed by the jury in every malice murder case, because it is an element which the jury must find beyond a reasonable doubt if it is to convict a defendant. Intent is thus "at issue," i.e., remains a question to be resolved by the jury, unless it is admitted by the defendant, *see Connecticut v. Johnson, supra,* 460 U.S. at 87, 103 S.Ct. at 978, or the evidence concerning it is so "overwhelming" that a jury can reach only one conclusion, *see Lamb v. Jernigan, supra,* 683 F.2d at 1342. Except where it includes a direct admission of intent, no defense, in and of itself, can take the element of intent out of "issue." Because the jury must still find this element beyond a reasonable doubt, an instruction which removes the burden of proving this element from the prosecution is no less prejudicial to the defendant in a case where he focuses on the defense of non-participation than in a case where he argues that he lacked *mens rea.*

The application of the *Lamb* or *Chapman* standard to the facts of the case compels rejection of the majority's conclusion. At no point in the proceeding did petitioner

state that he intended to kill the victim. Nor can it be said that the evidence of intent *on the part of the petitioner* was "overwhelming."[1] Davis stated on several occasions that he had driven the victim and two acquaintances to a private home, that on arrival he had exited to another room, and that he did not even see any of the others until he heard a shot and entered to find the victim on the floor. The State, moreover, presented no alternative version of the facts. The question of whether the prosecution had proved beyond a reasonable doubt petitioner's intent to kill was very much "at issue." It is impossible to say that an instruction which relieved the prosecution of its burden with respect to this element was harmless beyond a reasonable doubt.

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[1] The majority proposes to consider instead whether the evidence "that whoever killed the victim did so with intent" was overwhelming. This substitution is wholly unacceptable for the obvious reason that it *assumes* that "whoever killed the victim" and the petitioner are the same person—the very issue which was before the jury during the trial. Under the "overwhelming evidence" prong of the *Lamb* test, the court is supposed to evaluate the evidence which was presented *at trial*, not the conclusions which were drawn from that evidence by the jury. *Lamb v. Jernigan*, *supra*, at 1342. The evidence concerning the wounds sustained the victim was not evidence which was offered at trial to describe the mental state of Curfew Davis. It is not appropriate to apply that evidence to him under the *Lamb* standard simply because the jury later found him guilty. If the retroactive validation and application of all of the State's evidence to the defendant were acceptable, a reviewing court could find the evidence "overwhelming" in virtually any case in which a guilty verdict had been reached.